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No. 02-

IN THE

Supreme Court of the United States

MILLCRAFT-SMS SERVICES, L.L.C.
and ARIZONA CHEMICAL COMPANY,

Petitioners,

v.

CYNTHIA UNDERWOOD, in her official capacity as Commissioner of the State of Alabama Department of Revenue,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the State of Alabama alter settled precedent to deny taxpayers their right to sue for a refund of franchise taxes declared unconstitutional in *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999)?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Millcraft-SMS Services, L.L.C., is the successor in interest to Gladwin Corporation; its owners are privately held corporations. Petitioner Arizona Chemical Company is wholly owned by International Paper Company, which is publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Millcraft-SMS Services, L.L.C. and Arizona Chemical Company respectfully petition the Court for a writ of certiorari to review the decision of the Alabama Supreme Court in this case.

OPINIONS BELOW

The Alabama Supreme Court's opinion (App. 1a–34a) is not yet reported. The trial court's opinion (App. 35a–64a) is unpublished. The Alabama Supreme Court's opinion in the prior appeal (App. 65a–74a) is published at 723 So. 2d 15. The trial court's prior injunction order (App. 75a–78a) is unpublished.

STATEMENT OF JURISDICTION

The Alabama Supreme Court entered its final judgment on May 17, 2002. App. 1a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case presents the question whether the Due Process Clause of the Fourteenth Amendment requires the State of Alabama to provide Petitioners the same post-deprivation remedy for an unconstitutional tax that was previously provided to other taxpayers in similar circumstances. Section 1 of the Fourteenth Amendment provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

This case is a class action brought by Petitioners on behalf of thousands of foreign corporations who paid franchise taxes to the State of Alabama under the tax scheme ruled unconstitutional in *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 162, 169 (1999). *See* App. 1a–3a. The complaint seeks (1) a judgment declaring Alabama's franchise tax unconstitutional because it discriminated against foreign corporations, (2) a permanent injunction against future collection of the tax, and (3) a refund of the previously collected taxes. *See* App. 68a. The suit is against the Commissioner of the State of Alabama Department of Revenue. *See* App. 3a. Respondent Cynthia Underwood, the current Commissioner, has been substituted for her predecessors in this action. App. 3a n.1.

This case was filed while the *South Central Bell* litigation was pending. *See* App. 2a. On Respondent's motion, the trial court initially placed the case on the administrative docket until the resolution of *South Central Bell*. *See* App. 68a. Gladwin subsequently moved to have the case restored to the active docket and requested an injunction placing the franchise taxes collected by the State into escrow. *See* App. 68a–69a. Such an injunction was necessary, Gladwin argued, because the State had taken the position that taxpayers would not be entitled to a refund of taxes paid even if Alabama's franchise tax were declared unconstitutional. *See* App. 70a–71a. The trial court granted Gladwin's motion and entered an injunction directing the Commissioner to place the collected foreign franchise taxes into escrow. App. 75a–77a.

On appeal, the Alabama Supreme Court reversed the trial court's injunction because it concluded that the taxpayers had an adequate remedy at law. App. 70a–72a. The court held that Gladwin had failed to prove that an injunction was necessary to prevent "an imminent risk of irreparable injury." App. 72a. In so holding, the Alabama Supreme Court credited Gladwin's argument — based on *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. 442 (1998), *Reich v. Collins*, 513 U.S. 106 (1994), and *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) —that the class was entitled to meaningful backward-looking relief as a matter of federal due process. App. 71a–72a. Gladwin's argument "that it is entitled to the *full range of retroactive relief, including refunds*" led the court to decide that injunctive relief was not necessary in the interim "if [the franchise tax] is ultimately held to be unconstitutional." App. 72a.

On remand, after this Court had unanimously held that Alabama's franchise tax scheme violated the Commerce Clause in *South Central Bell*, 526 U.S. at 169, Gladwin and Arizona Chemical (added as a representative plaintiff by an amended complaint) filed a motion for class certification. *See* App. 37a–38a. The Commissioner moved to dismiss the case, contending that the court lacked subject-matter jurisdiction because the taxpayers had failed to exhaust their administrative remedies before filing suit. *See* App. 39a–40a. The trial court denied the Commissioner's motion to dismiss, citing prior decisions of the Alabama Supreme Court and the Alabama Court of Civil Appeals holding that taxpayers may bring a direct action to challenge the constitutionality of a tax without following the administrative procedures provided by Ala. Code §§ 40-2A-1 through 40-2A-15 (the Alabama Taxpayers' Bill of Rights and Uniform

Procedures Act, or "TBOR"). App. 41a–42a. In the same order, the trial court certified an opt-out class of foreign corporations seeking refunds of franchise taxes that were unconstitutionally collected. App. 44a, 59a–64a.

The Commissioner filed an interlocutory appeal from the trial court's class certification ruling pursuant to Ala. Code § 6-5-642. *See* App. 3a. The parties' briefs addressed the class certification issues raised by the trial court's order. Less than a month before oral argument, however, the Alabama Supreme Court directed the parties to be prepared to discuss whether sovereign immunity barred Petitioners' claims for refunds of franchise taxes, absent compliance with the administrative procedures set forth in the TBOR.

The Alabama Supreme Court ultimately vacated the trial court's class certification order and dismissed the case on sovereign immunity grounds. App. 34a. The court's decision rests on two conclusions. First, in rejecting Petitioners' argument under *Reich*, the court recognized that "the question is whether the 'reasonable taxpayer would have thought that [the TBOR] represented . . . the exclusive remedy for unlawful [franchise] taxes.'" App. 12a (quoting *Reich*, 513 U.S. at 111). The court concluded that the reasonable taxpayer would have thought so, notwithstanding 45 years of Alabama precedent holding otherwise. App. 12a. To reach this conclusion, the Alabama Supreme Court had to distinguish five of its prior decisions and overrule two opinions of the Court of Civil Appeals holding that taxpayers could bring direct actions for refunds of unconstitutional taxes without following the administrative refund procedures. App. 29a–33a.

Second, the Alabama Supreme Court concluded that Petitioners could not invoke any of the recognized exceptions to sovereign immunity. App. 7a, 28a–29a. Although many of its prior tax decisions had held that a refund of illegal taxes was a "ministerial act" not protected by sovereign immunity, the court stated that calculating a tax refund is ministerial "*only because the statutes make it so*." App. 29a. The court thus held that "compliance with the TBOR is the exclusive means to a franchise-tax refund." App. 32a. Because Petitioners brought this direct action for refunds outside the TBOR procedures, the Alabama Supreme Court found that their "reliance on the ministerial-act exception to sovereign immunity is misplaced." App. 29a.

Finally, the Alabama Supreme Court recognized the incongruity between its ultimate decision and its decision in the prior appeal in this case. In a footnote, the court stated that in the prior appeal "the Court was not apprised of Gladwin's failure to proceed under the TBOR," and thus "the Court had no reason to suspect the absence of subject-matter jurisdiction" when it held that Gladwin had an adequate remedy at law. App. 34a n.3. The record refutes this statement. Paragraph 21 of the original complaint, which was before the Alabama Supreme Court in the prior appeal, plainly stated that Gladwin had made "[n]o prior demands or claims pursuant to Alabama law or Alabama administrative procedure" because "Alabama law makes plain that they are unnecessary when the challenge is to the facial constitutionality of the tax."

REASON FOR GRANTING THE WRIT

In order to deprive foreign corporations of a refund of franchise taxes that this Court declared unconstitutional in *South Central Bell*, 526 U.S. at 169, the Alabama Supreme Court has announced that taxpayers are no longer permitted to bring a direct court action for such a refund. To reach this result, the Alabama Supreme Court had to distinguish or overrule more than 45 years of Alabama precedent on which Petitioners relied to bring this suit. The Alabama Supreme Court's effort to "bait and switch" Petitioners by withdrawing their ability to sue for a refund midcourse is hardly novel and cannot be allowed to stand.

On more than one occasion in the past, states have changed their tax refund procedures in response to this Court's rulings. When faced with such remedial gamesmanship, this Court has stepped in, sometimes through use of summary review, to compel the state to provide the remedy required by due process. *See Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 444–45 (1998) (per curiam); *Reich v. Collins*, 513 U.S. 106, 111 (1994). This Court should grant the petition and summarily reverse the decision below to ensure that states cannot avoid the Court's constitutional tax rulings by subsequently changing their procedural law to deny taxpayers a remedy.

The Alabama Supreme Court's holding that Petitioners cannot sue directly to obtain a refund of unconstitutional taxes represents a sea change in Alabama law. Under this Court's previous "bait and switch" cases, the relevant inquiry is what the "reasonable" or "average" taxpayer would have believed was required to obtain a refund. *Reich*, 513 U.S. at 111. If no reasonable or average taxpayer would have thought, when this case was filed, that resort to the

administrative procedures was necessary before it could sue for a refund, then Alabama cannot require such prior resort now. *Newsweek*, 522 U.S. at 444; *Reich*, 513 U.S. at 111.

Any reasonable or average taxpayer looking at Alabama tax refund law prior to the decision below would have believed that a direct action, without prior resort to administrative remedies, was a proper means to obtain a refund of unconstitutional taxes. Over 45 years ago, the Alabama Supreme Court declared that "'[t]he necessity for pursuing the statutory remedy does not exist where the assessment complained of is void and illegal.'" *Graves v. McDonough*, 88 So. 2d 371, 373 (Ala. 1956) (quoting 84 C.J.S. *Taxation* § 513 at n.90 (1954)). This is so because an administrative body such as the Administrative Law Division of the Alabama Department of Revenue does not have jurisdiction to decide constitutional challenges. *Budget Inn of Daphne, Inc. v. City of Daphne*, 789 So. 2d 154, 158 (Ala. 2000); *Corbitt v. Mangum*, 523 So. 2d 348, 350 (Ala. 1988); *MCI Telecomm. Corp. v. Alabama Dep't of Revenue*, 1996 WL 93670, at *3 (Admin. L. Div. of Ala. Dep't of Revenue Jan. 11, 1996). Indeed, the Alabama Supreme Court has repeatedly acknowledged the propriety of direct class actions seeking refunds of illegal taxes without prior resort to administrative procedures. *See, e.g., Eagerton v. Williams*, 433 So. 2d 436, 448–49 (Ala. 1983); *Thorn v. Jefferson County*, 375 So. 2d 780, 788 (Ala. 1979). Although the Alabama Supreme Court's decision attempts to distinguish those cases by noting that each of them involved *ad valorem* taxes (App. 29a), the rationale employed in those cases was in no way limited to *ad valorem* taxes; instead, it was based on black letter tax law. *See Graves*, 88 So. 2d at 373 (quoting 84 C.J.S. *Taxation* § 513 at n.90), *quoted in Eagerton*, 433 So. 2d at 448. And although the decision

contends that those cases involved actions against counties, not the State (App. 29a), the Alabama Revenue Commissioner was a defendant in *Mingledorff v. Vaughan Regional Medical Center, Inc.*, 682 So. 2d 415, 415–16 (Ala. 1996), *White v. Sims*, 470 So. 2d 1191, 1191 (Ala. 1985), and *Eagerton*, 433 So. 2d at 436. The Alabama Supreme Court's attempt to avoid the effects of its own precedents misses the mark. Based on those prior decisions, the average Alabama taxpayer would have reasonably viewed a direct action as a "clear and certain remedy for taxes collected in violation of federal law." *Reich*, 513 U.S. at 108 (internal quotations omitted).

Any doubt about what a reasonable Alabama taxpayer would have believed concerning the availability of a direct action to obtain a refund is resolved by two decisions of the Alabama Court of Civil Appeals. On two occasions in the last ten years, that court held — without a dissenting vote — that a direct class action is an appropriate method to obtain a refund of an illegal tax without any need to utilize administrative procedures. *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470, 473 (Ala. Civ. App. 1999) ("Because [the taxpayer] challenged the legal validity and the constitutionality of the [tax in question], it was not required to exhaust its administrative remedies before resorting to the courts."), *cert. denied*, (Ala. Nov. 5, 1999), *and cert. denied*, 529 U.S. 1022 (2000); *Sizemore v. Rinehart*, 611 So. 2d 1064, 1067–68 (Ala. Civ. App. 1992), *writ quashed as improvidently granted*, 611 So. 2d 1069 (Ala. 1993). Looking to the Alabama Supreme Court's decision in *Thorn*, the Court of Civil Appeals in *Rinehart* stated, "our supreme court held that the statutory procedure for refund of taxes does not apply where the assessment complained of is void and illegal and that a class action was a proper remedy for the recovery of

any taxes which were paid illegally." 611 So. 2d at 1067 (internal quotations omitted). If the judges of the Alabama Court of Civil Appeals examined the Alabama Supreme Court's body of case law in the tax refund area and twice concluded that it authorized a direct class action remedy in this context, then how could the Alabama Supreme Court conclude that an average taxpayer should have drawn a different conclusion?

The Alabama Supreme Court invoked the doctrine of sovereign immunity to circumvent its prior precedents. But no reasonable taxpayer could have foreseen that sovereign immunity would preclude a direct action for a refund of the unconstitutional tax. In 1995, just months before this matter was filed, the Alabama Court of Civil Appeals expressly rejected the argument that sovereign immunity precluded a class action for refund of a tax alleged to violate the Commerce Clause. *Sizemore v. Owner-Operator Indep. Drivers Ass'n, Inc.*, 671 So. 2d 674, 677 (Ala. Civ. App. 1995), *cert. denied*, (Ala. Nov. 9, 1995), and *cert. denied sub nom. Eagerton v. Owner-Operator Indep. Drivers Ass'n, Inc.*, 517 U.S. 1121 (1996).

The Alabama Supreme Court's conclusion that sovereign immunity bars Petitioners' claims is both illogical and contrary to well-established Alabama law. Under Alabama law, sovereign immunity does not protect state officials from suits to compel the performance of ministerial acts, and calculating a refund of illegally collected taxes has long been considered a ministerial act. *See, e.g., Sparks v. Louisville & Nashville R.R. Co.*, 166 So. 2d 865, 868 (Ala. 1964); *Horn v. Dunn Bros., Inc.*, 79 So. 2d 11, 15, 17 (Ala. 1955); *Glass v. Prudential Ins. Co. of Am.*, 22 So. 2d 13, 17–18 (Ala. 1945). Nonetheless, the Alabama Supreme Court

concluded, without citation to any prior case, that the act of calculating a refund of unconstitutional taxes is not ministerial if the taxpayer sues directly for a refund, but that the same act is ministerial if the taxpayer follows the administrative remedies set forth in the TBOR. App. 29a. In other words, the same act by the same Revenue Department employee is somehow different, according to the Alabama Supreme Court, depending on the means a taxpayer uses to obtain the refund. This conclusion finds no support in prior Alabama law or in logic. Given that this Court has already determined that the Alabama franchise tax violated the Commerce Clause, the determination of the appropriate refund involves a straightforward calculation based on the Commissioner's own computerized records. *See* App. 54a–55a, 57a–58a. That act is ministerial, whether the taxpayer followed administrative or judicial procedures in seeking the refund.

Finally, by holding that compliance with the TBOR's statutory procedures is the only way a taxpayer can avoid sovereign immunity, the Alabama Supreme Court altered fundamental concepts of immunity enshrined in the Alabama Constitution. Although Alabama's first, second, and third Constitutions gave the Legislature the power to control sovereign immunity, the Constitutions of 1875 and 1901 (the current version) revoked that power and made the State's immunity absolute. *Compare* ALA. CONST. of 1819, art. VI, § 9, ALA. CONST. of 1865, art. I, § 15, and ALA. CONST. of 1868, art. I, § 16, *with* ALA. CONST. of 1875, art. I, § 15 and ALA. CONST of 1901, art. I, § 14. *See generally Ex parte Cranman*, 792 So. 2d 392, 396–99 (Ala. 2000) (recounting this history); *Hutchinson v. Board of Trustees*, 256 So. 2d 281, 282–83 (Ala. 1971) (same). The Alabama Supreme Court has repeatedly recognized, as recently as last year, that

the Alabama Constitution prevents the Legislature from waiving the State's sovereign immunity. *See, e.g., Larkins v. Department of Mental Health & Mental Retardation*, 806 So. 2d 358, 363 (Ala. 2001); *Dunn Constr. Co. v. State Bd. of Adjustment*, 175 So. 383, 386 (Ala. 1937). That has been the law of Alabama for 126 years — that is, until now. The only way the Alabama Supreme Court could reach the result in this case was by changing Alabama constitutional law and implicitly overruling those precedents. If, as the Alabama Supreme Court reasoned, adherence to the TBOR procedures is the only way a taxpayer can obtain a ministerial refund, then that must mean the Legislature's enactment of those statutory procedures somehow waived the State's sovereign immunity. What the court conspicuously failed to mention is that the Alabama Constitution prohibits such a result, whether attempted through legislative enactment or judicial interpretation. *See Cranman*, 792 So. 2d at 399 ("[N]either the Alabama Legislature nor this Court has the power to waive the State's sovereign immunity from suit. Nor can the Legislature or this Court eliminate the right to a remedy by a civil action against a [state agent] unless our constitution authorizes it to do so.") (footnotes omitted).

In sum, the Alabama Supreme Court's decision in this case cannot withstand even minimal scrutiny. It appears to be a last-ditch effort by that court to evade the State's obligation under the Due Process Clause to provide Petitioners the means to a refund that was available when they filed suit. The Alabama Supreme Court's holding that Petitioners cannot sue directly for a refund is all the more surprising, considering that the same court, three-and-a-half years earlier in this case, held that Petitioners were not entitled to equitable relief from the State because they had an adequate remedy at law, namely, "the *full range*

of retroactive relief, including refunds" required by this Court's decisions in *Newsweek*, *Reich*, and *McKesson*. App. 72a. Apparently, the only way Petitioners may obtain that remedy now is by resort to this Court.

This Court should grant the petition and summarily reverse the decision of the Alabama Supreme Court. If Alabama is allowed to succeed in perpetrating a procedural "bait and switch" to avoid its obligation to refund unconstitutionally exacted taxes, then other states will be emboldened in similar efforts to ignore the remedial consequences of this Court's rulings. No matter how unpleasant refunds of unconstitutional taxes may be for Alabama and its treasury, the Due Process Clause prohibits the State from withdrawing a remedy that, under longstanding Alabama law, was available to Petitioners until the decision below. This Court cannot allow the State of Alabama to succeed in its effort to avoid the consequences of *South Central Bell*.

CONCLUSION

Because the Alabama Supreme Court's decision amounts to a "bait and switch" prohibited by due process, Petitioners ask this Court to grant the petition and summarily reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF ALABAMA DATED MAY 17, 2002

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2001-2002

1001747

Michael L. Patterson, in his official capacity as Commissioner of the Department of Revenue

v.

Gladwin Corporation et al.

Appeal from Montgomery Circuit Court (CV-96-1065)

WOODALL, Justice.

This is a direct action against the State of Alabama seeking refunds of previously paid corporate franchise taxes. We dismiss the action for lack of subject-matter jurisdiction.

I. Factual and Procedural Background

This case is another chapter in long-running litigation over corporate franchise taxes collected pursuant to Ala. Code 1975, §§ 40-14-40, and -41, repealed by Act No. 665, 1999 Ala. Acts 131, Second Special Session. For the history of this litigation, see *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999) (holding Alabama's franchise-tax statutes unconstitutional); *on remand, South Central Bell*

Telephone Co. v. State, 789 So. 2d 133 (Ala. 1999) ("First Interim Order"), and 789 So. 2d 147 (Ala. 2000) ("Second Interim Order"); *Ex parte Monroe*, 723 So. 2d 15, 17 (Ala. 1988); *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989) (upholding the franchise-tax statutes against a constitutional challenge), *cert. denied sub nom., Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990). The initial complaint in *this* action was filed as a class action on May 24, 1996, while *South Central Bell* was pending, by Gladwin Corporation ("Gladwin") "on behalf of itself and all other corporations similarly situated." *Ex parte Monroe*, 723 So. 2d 15 (Ala. 1998) (an appeal from an interlocutory order in the case now before us). Gladwin sought a refund *initially* in the circuit court; it invoked *none* of the administrative procedures for relief set forth in the Taxpayers' Bill of Rights and Uniform Revenue Procedures Act, Ala. Code 1975, § 40-2A-1 *et seq.* ("the TBOR"). This case was placed on the administrative docket in the Montgomery Circuit Court, pending resolution of the issues in *South Central Bell.*

On remand of *South Central Bell* from the United States Supreme Court, this Court ordered the parties in that case to marshal evidence and present arguments that would be useful to this Court in fashioning a remedy consistent with the United States "Constitution and the holdings of the United States Supreme Court." 789 So.2d at 151. Instead, however, the parties settled the dispute, and *South Central Bell* was dismissed. Subsequently, this case proceeded.

The complaint as last amended on November 1, 2000, added Arizona Chemical Company ("ACC") as a class representative. Before joining this action, ACC had petitioned

the Department of Revenue ("the Department") for a refund of franchise taxes it had paid from 1995 to 1999. The Department failed to respond to the petition within six months, and it was deemed denied by operation of law. § 40-2A-7(c)(3). Subsequently, ACC appealed, pursuant to § 40-2A-7(c)(5), to the administrative law division of the Department. While that appeal was pending, however, ACC asserted its claims in the amended class-action complaint.

Gladwin and ACC (hereinafter collectively referred to as "the Taxpayers") seek to represent a class of foreign corporations that have paid, or that have been assessed, franchise taxes under the invalid tax scheme. They seek "refunds with interest of the sums that Alabama already has collected, pursuant to its foreign franchise tax . . . for tax years prior to 2000." On June 13, 2001, the trial judge certified, pursuant to Ala. R. Civ. P. 23(b)(3), an opt-out class consisting of approximately 18,000 class members and placing approximately $1 billion in controversy.

Cynthia Underwood, in her official capacity as Commissioner of the Department of Revenue ("the Commissioner"),[1] appeals from the class-certification order. On appeal, she contends that this action is due to be dismissed, on the ground that the Taxpayers have not invoked the trial court's jurisdiction. This is so, she argues, because the Taxpayers have not availed themselves of the refund procedures provided in the TBOR. She cites § 40-2A- 7(c)(5), which states:

---

1. Underwood is the current Commissioner, and has been substituted for Michael L. Patterson, her predecessor, in this action, pursuant to Ala. R. Civ. P. 25.

Appendix A

> "a. A taxpayer may appeal from the denial in whole or in part of a petition for refund by filing a notice of appeal with the administrative law division within two years from the date the petition is denied, and the appeal, if timely filed, shall proceed as hereinafter provided for appeals to the administrative law division.
>
> "b. In lieu of appealing to the administrative law division, the taxpayer may appeal from the denial of a petition for refund by filing a notice of appeal with the Circuit Court in Montgomery County . . . is denied. . . .
>
> "c. If an appeal is not filed with the Administrative Law Division or the circuit court within two years of the date the petition is denied, then the appeal shall be dismissed for *lack of jurisdiction.*"

(Emphasis added.) She also cites Ala. Code 1975, § 40-2A-9(g)(1), which similarly states:

> "Either the taxpayer or the department may appeal to circuit court from a final order issued by the administrative law judge by filing a notice of appeal with the Administrative Law Division and with the circuit court within 30 days from the date of entry of the final order. . . . The circuit court *shall dismiss any appeal* that is not timely filed with the Administrative Law Division and the circuit court as herein provided. . . ."

(Emphasis added.) It is undisputed that the Taxpayers are not proceeding under the TBOR, but, instead, are attempting to prosecute a direct action in the circuit court. Thus, the Commissioner contends, the trial court lacks *subject-matter jurisdiction* of the Taxpayers' claims.

The Taxpayers, however, define the issue, not in terms of subject-matter jurisdiction, but in terms of "exhaustion of remedies." In fact, they rely on certain *exceptions* to that doctrine as authority for bypassing the TBOR. The right to commence a direct action in the circuit court, they insist, turns "on *what sort of challenge* is being made to the tax." Taxpayers' Brief, at 26 (emphasis added). More specifically, they argue that a taxpayer seeking a refund from the State treasury "need not exhaust administrative remedies when challenging the overall validity or constitutionality of a tax." *Id.* We disagree with this contention.

To be sure, Alabama recognizes the doctrine of exhaustion of administrative remedies. *City of Huntsville v. Smartt*, 409 So. 2d 1353, 1357 (Ala. 1982). "This doctrine 'requires that where a controversy is to be initially determined by an administrative body, the courts will decline relief until those remedies have been explored and, in most instances, exhausted.' " *Id.* (quoting *Fraternal Order of Police, Strawberry Lodge No. 40 v. Entrekin*, 294 Ala. 201, 209, 314 So. 2d 663, 670 (1975)). Also, we recognize exceptions to the doctrine, such as where "[q]uestions of law and of statutory and constitutional construction preponderate over questions of fact." *Mingledorff v. Vaughan Regional Med. Ctr., Inc.*, 682 So. 2d 415, 416 (Ala. 1996). In Alabama, however, the exhaustion-of-remedies doctrine "is a judicially

imposed prudential limitation, *not an issue of subject-matter jurisdiction.*" *Budget Inn of Daphne, Inc. v. City of Daphne*, 789 So. 2d 154, 157 (Ala. 2000) (emphasis added).

The Commissioner's position — indeed, the *centerpiece* of her subject-matter jurisdiction argument — is that a direct action in the circuit court seeking a tax refund from the State treasury is barred by the principle of sovereign immunity, as that principle is expressed in Ala. Const. 1901, § 14. Section 14 provides: "That the State of Alabama shall never be made a defendant in any court of law or equity."

The wall of immunity erected by § 14 is nearly impregnable. *Sanders Lead Co. v. Levine*, 370 F. Supp. 1115, 1117 (M.D. Ala. 1973); *Taylor v. Troy State Univ.*, 437 So. 2d 472, 474 (Ala. 1983); *Hutchinson v. Board of Trustees of Univ. of Alabama*, 288 Ala. 20, 24, 256 So. 2d 281, 284 (1971). This immunity may not be waived. *Larkins v. Department of Mental Health & Mental Retardation*, 806 So. 2d 358, 363 (Ala. 2001) ("The State is immune from suit, and its immunity cannot be waived by the Legislature or by any other State authority"); *Druid City Hosp. Bd. v. Epperson*, 378 So. 2d 696 (Ala. 1979) (same); *Opinion of the Justices No. 69*, 247 Ala. 195, 23 So. 2d 505 (1945) (same); see also *Dunn Constr. Co. v. State Bd. of Adjustment*, 234 Ala. 372, 175 So. 383 (1937). "This means not only that the state itself may not be sued, but that this cannot be *indirectly* accomplished by suing its officers or agents in their official capacity, when a result favorable to plaintiff would be directly to *affect the financial status of the state treasury.*" *State Docks Comm'n v. Barnes*, 225 Ala. 403, 405, 143 So. 581, 582 (1932) (emphasis added); see also *Southall v. Stricos Corp.*, 275 Ala. 156, 153 So. 2d 234 (1963).

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This Court has recognized several species of action that are not "against the State" for § 14 purposes. They include:

> "(1) Actions brought to compel State officials to perform their legal duties. *Department of Industrial Relations v. West Boylston Manufacturing Co.*, 253 Ala. 67, 42 So. 2d 787 [(1949)]; *Metcalf v. Department of Industrial Relations*, 245 Ala. 299, 16 So. 2d 787 [(1944)]. (2) Actions brought to enjoin State officials from enforcing an unconstitutional law. *Glass v. Prudential Insurance Co. of America*, 246 Ala. 579, 22 So. 2d 13 [(1945)]. . . . (3) Actions to compel State officials to perform ministerial acts. *Curry v. Woodstock Slag Corp.*, 242 Ala. 379, 6 So. 2d 479 [(1943)], and cases there cited. (4) Actions brought under the Declaratory Judgments Act, [Ala. Code 1975, § 6-6-220 et seq.], seeking construction of a statute and how it should be applied in a given situation."

Aland v. Graham, 287 Ala. 226, 229-30, 250 So. 2d 677, 679 (1971). "In determining whether an action against a state officer is barred by § 14, the Court considers the *nature of the suit* or the *relief demanded,* not the character of the office of the person against whom the suit is brought." *Ex parte Carter*, 395 So. 2d 65, 67-68 (Ala. 1980) (emphasis added).

Thus, if an action seeking tax refunds is an action against the State within the meaning of § 14, then neither the doctrine of exhaustion of remedies nor the exceptions thereto apply. Such a case presents a question of subject-matter jurisdiction,

which cannot be waived or conferred by consent. *Sustainable Forests, L.L.C. v. Alabama Power Co.*, 805 So. 2d 681 (Ala. 2001); *Stringfellow v. State Farm Life Ins. Co.*, 743 So.2d 439 (Ala. 1999); *Equity Res. Mgmt., Inc. v. Vinson*, 723 So.2d 634 (Ala. 1998).

A direct action for a refund of taxes paid to the State is essentially "a common law action of indebitatus assumpsit against the State." *J.R. Raible Co. v. State Tax Comm'n*, 239 Ala. 41, 44, 194 So. 560, 561 (1939). Clearly, a judgment in favor of the class, which seeks tax refunds totaling approximately $1 billion, would "*affect the financial status of the state treasury.*" *State Docks Comm'n v. Barnes*, 225 Ala. at 405, 143 So. at 582 (emphasis added). See also *Williams v. Hank's Ambulance Serv., Inc.*, 699 So. 2d 1230, 1232 (Ala. 1997) (a judgment in favor of medical providers requiring reimbursement from the State for services, which payment had been withheld under the State's erroneous interpretation of federal statutes, would " 'directly affect a . . . property right of the State,' " and, therefore, was barred by § 14); *Ex parte Sizemore*, 611 So. 2d 1069, 1070 (Ala. 1993) (an action seeking a refund of income taxes paid on military retirement benefits was an unconstitutional "action against the state, seeking as a remedy funds from the state treasury") (Houston, J., dissenting from quashing the writ of certiorari). Consequently, the question is one of subject-matter jurisdiction, not exhaustion of remedies.

II. The Taxpayers' Bait-and-Switch Argument

The Taxpayers argue that "[t]he United States Constitution precludes Alabama from withdrawing a remedy

that the average taxpayer reasonably believed was available." Taxpayers' Brief, at 33. They insist that taxpayers interpreting "45 years" of Alabama law would not have concluded that a direct action seeking franchise-tax refunds would be barred by § 14. More specifically, they state: "Whether or not Alabama is required to offer taxpayers a direct action for refunds of unconstitutional taxes, the State cannot hold out the existence of such a remedy — as it has done these past 45 years — only to withdraw that remedy after the fact." Taxpayers' Brief, at 33. For this proposition, they cite *Reich v. Collins*, 513 U.S. 106 (1994), which some courts have dubbed "a 'bait-and-switch' case." *Stone Container Corp. v. United States*, 229 F.3d 1345, 1351 (Fed. Cir. 2000), *cert. denied sub nom., Smurfit-Stone Container Corp. v. United States*, 532 U.S. 971 (2001).

Reich involved an action for a tax refund, pursuant to Ga. Code Ann. § 48-2-35(a). Section 48-2-35(a) provided: " 'A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily. . . .' " 513 U.S. at 109. After the United States Supreme Court decided *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), in which the Court invalidated state statutory schemes that "exempted from state personal income tax retirement benefits paid by the State, but not retirement benefits paid by the Federal Government (or any other employer)," 513 U.S. at 108, a Georgia taxpayer sought, pursuant to § 48-2-35(a), a refund of taxes he had paid under Georgia's version of the unconstitutional scheme. The Georgia Supreme Court denied the refund, holding that Georgia law provided "ample

predeprivation remedies," *Reich v. Collins*, 263 Ga. 602, 604, 437 S.E. 2d 320, 322 (1993) (emphasis added), *rev'd*, 513 U.S. 106 (1994), that is, opportunities to challenge tax assessments while *withholding* payment. Because the taxpayer had not availed himself of those predeprivation provisions, that court concluded, he could, consistent with due process, be denied the right to proceed under § 48-2-35(a).

The United States Supreme Court disagreed, and it reversed the judgment of the Georgia Supreme Court. In doing so, the Court explained:

> "The Georgia Supreme Court is no doubt right that, under *McKesson [Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990)], Georgia has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as that scheme is 'clear and certain.' Due process, we should add, also allows the State to maintain an exclusively postdeprivation regime, . . . or a hybrid regime. A State is free as well to reconfigure its remedial scheme over time, to fit its changing needs. Such choices are generally a matter only of state law.
>
> "But what a State may *not* do, and what Georgia did here, is to reconfigure its scheme, unfairly, in *midcourse* — to 'bait and switch,' as some have described it. Specifically, in the mid-1980's, Georgia held out what plainly appeared to be a 'clear and certain' postdeprivation remedy,

> in the form of its tax refund statute [§ 48-2-35(a)], and then declared, only after Reich and others had paid the disputed taxes, that no such remedy exists. In this regard, the Georgia Supreme Court's reliance on Georgia's predeprivation procedures was entirely beside the point (and thus error), because even assuming the constitutional adequacy of these procedures — an issue on which we express no view — no reasonable taxpayer would have thought that they represented, in light of the apparent applicability of the refund statute, the *exclusive* remedy for unlawful taxes. . . .
>
> "Nor can there be any question that, during the 1980's, prior to [this litigation], Georgia did appear to hold out a 'clear and certain' postdeprivation remedy. To recall, the Georgia refund statute says that the State '*shall*' refund '*any and all* taxes or fees which are determined to have been erroneously or *illegally assessed* and collected from [a taxpayer] under the laws of this state, whether paid voluntarily or involuntarily. . . .' "

513 U.S. at 110-11.

The Court also noted that the construction placed on the statute by the Georgia Supreme Court before the *Reich* litigation was "entirely consistent with that language's apparent breadth." 513 U.S. at 112. In short, it concluded that the taxpayer was entitled to proceed under § 48-2- 35(a), notwithstanding his failure to invoke any of the available predeprivation procedures.

The Taxpayers contend that an opinion in this case holding that the TBOR is jurisdictional, thus providing the exclusive means to a franchise-tax refund, would represent an unconstitutional "bait-and-switch." The ultimate question, therefore, is whether the reasonable taxpayer could have construed Alabama law as providing a right to prosecute an original action in the circuit court for a refund of franchise taxes assessed and paid under a statutory scheme ultimately held to be unconstitutional. Otherwise stated in the words of *Reich*, the question is whether the "reasonable taxpayer would have thought that [the TBOR] represented . . . the *exclusive* remedy for unlawful [franchise] taxes." 513 U.S. at 111. We answer the question in the affirmative.

" 'It is well settled that the right to reclaim money voluntarily paid to the state or the counties thereof, as taxes, is a creature of legislative grace. . . .' " *Board of Revenue & Road Comm'rs of Mobile County v. Jones*, 236 Ala. 244, 245, 181 So. 908, 909 (1938) (quoting *Lee v. Cunningham*, 234 Ala. 639, 642, 176 So. 477, 480 (1937)). "In the absence of statute a refund of monies paid into the state treasury under color of the revenue laws of the state were not subject to refund." *Curry v. Johnston*, 242 Ala. 319, 320, 6 So. 2d 397, 397 (1942).

For taxpayers seeking refunds of taxes paid to the State, the Legislature, over the years, has provided a number of procedural remedies. One such procedural remedy allowed the taxpayer to pay the tax "under protest" and then to commence an action to litigate the merits of the claim. A second procedure consisted of an appeal from a final assessment. Finally, where the tax was paid "through mistake

or error," a taxpayer was entitled to a writ of mandamus to compel a refund. Because this Court has never addressed the TBOR in the context of § 14, we shall briefly discuss each of the procedures provided by its statutory predecessors, as those procedures would have been understood by the "reasonable taxpayer."

A. Payment Under Protest

In 1935, the Legislature passed Act No. 194, § § 379-80 1935 Ala. Acts 256, codified at Ala. Code 1940, Tit. 51, §§ 890-91; Ala. Code 1958 (Recompiled); Ala. Code 1975, §§ 40-1-11 to -12; repealed, Act No. 92-186, 1992 Ala. Acts 349, codified at Ala. Code 1975, § 40-2A-1 *et seq.*[2] Three years later, on August 2, 1938, J.R. Raible Company ("Raible") commenced an action against the "State Tax Commission of Alabama." *J.R. Raible Co. v. State Tax Comm'n*, 29 Ala. App. 184, 185, 194 So. 556, 557 (Ct. App.), *rev'd*, 239 Ala. 41, 194 So. 560 (1939). The two-count complaint sought refunds for license and sales taxes paid "under protest." 29 Ala. App. at 186, 194 So. at 557. The action was commenced pursuant to §§ 379-80 of Act No. 194, which provided:

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2. Act No. 194, entitled "An Act to Provide for the General Revenue of the State of Alabama," was "not only a general revenue act, but also adopted a revenue code that was the source of most of the 'Revenue and Taxation' title, title 40, of the 1975 Code of Alabama." *Childree v. Hubbert*, 524 So.2d 336, 339 (Ala. 1988). Its refund sections were scattered throughout the 1940 Code, the 1958 Code (Recompiled), and the 1975 Code. The TBOR, which repealed those sections, purported to "provide equitable and uniform procedures for the operation of the department and for all taxpayers when dealing with the department." Ala. Code 1975, § 40-2A-2.

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"Section 379. Whenever any taxpayer claims that any tax, except ad valorem taxes, herein levied, as fixed by the collecting officer is excessive or is invalid either in whole or in part, the taxpayer shall pay such tax under protest, and the officer receiving the same shall note on the receipt that such tax was paid under protest. Within sixty days after such payment under protest, *the taxpayer shall commence suit against the officer for the recovery of such amount as is claimed to be excessive or invalid,* and unless such suit is commenced within such period of sixty days from such payment, such payment shall be deemed voluntary. Upon hearing and judgment *the Court* shall determine what amount so paid is excessive or illegal, and *shall order the same to be repaid by the State* or its agencies receiving the same in the same manner as is provided in cases of appeals from the State Tax Commission, and such amount shall be refunded in the same manner."

"Section 380. Whenever any money for taxes paid to any officer authorized to receive or collect same is paid under protest, such officer *shall distribute to the various governmental agencies the proportion due such governmental agencies in the manner and at the times provided in this Act,* and at the time of such distribution, shall note the fact that such payment was made under protest, and the Treasurer or custodian of funds of such governmental agency, shall in giving his receipt therefor, note that such tax was paid under protest.

> Any Tax Collector or other officer authorized to receive and collect taxes noting such fact, shall not be personally liable for such payments should such taxes ultimately be held illegal or excessive."

(Emphasis added.)

After a nonjury trial, the court entered a judgment for the commission, and Raible appealed. The Court of Appeals reversed that judgment, and the commission sought certiorari review in this Court. On certiorari review, this Court reversed the judgment of the Court of Appeals. In doing so, it stated: "To all intents and purposes, this is a common law action of indebitatus assumpsit against the State, and the circuit court was without jurisdiction to entertain it." 239 Ala. at 44, 194 So. at 561. It further held that §§ 379 and 380, to the extent they purported to authorize an action in the circuit court for a tax refund, "patently violat[ed] § 14 of the Constitution, and any such judgment so rendered would be void." 239 Ala. at 44, 194 So. at 562 (opinion on rehearing).

Four years after *Raible* was decided, the Legislature passed Act No. 402, 1943 Ala. Acts 369, which amended Tit. 51, §§ 379 and 380. Act No. 402 provided:

> "Section 890. REMEDIES OF TAXPAYER. — Whenever any taxpayer claims that any tax, *except ad valorem taxes*, levied under the provisions of this act, as fixed by the officer authorized to collect same is excessive or is invalid, either in whole or in part, the taxpayer shall pay such tax under protest, and the officer receiving the same

shall note on the receipt that such tax was paid under protest. The taxpayer shall commence suit against the officer for the recovery of such excessive or invalid tax, as the case may be, within sixty days after the payment thereof under protest, and the unless such suit is commenced within that period of time, for the recovery of the amount of taxes claimed to be excessive or invalid, the taxpayer shall be deemed to have waived the payment of such taxes under protest and to have thereby become a voluntary taxpayer. If suit is filed for the recovery of any taxes paid under protest, within the specified period of time, and it is determined upon a hearing of the case that any part of the taxes so paid is excessive or illegal, the same shall be refunded as provided in the succeeding section. Section 891. DISPOSITION OF TAXES PAID UNDER PROTEST — Whenever any money is paid to any officer authorized to receive or collect same, as taxes paid under protest, such officer shall certify such sum of money to the State Treasury, with notice to the Treasurer that said sum of money was paid under protest by the identified taxpayer *and it shall be the duty of the Treasurer to hold such sum of money in an identified suspense account until it is judicially determined whether the taxes were legally levied and collected, or the taxpayer abandons the recovery of the money by failure to bring suit within the period of sixty days after the payment thereof. The Treasurer shall give notice to the Comptroller that such funds are set up in a*

> *suspense account and are therefore not available for allotment, allocation, or disbursement until the validity of the assessment and collection is determined by the Court.* If it is determined by the Court, on suit brought by the taxpayer, that any portion of the taxes paid under protest was excessive or illegally assessed and collected, the Comptroller shall issue his warrant upon the Treasurer for a refund of such sum as may have been determined by the Court to be excessive or invalid, and the remainder of such fund, if any, shall be allocated and disbursed as authorized by law."

(Emphasis added.) Thus, Act No. 402 amended the former law by requiring the establishment of an escrow account, in which the disputed taxes were to be held pending a determination of their proper disposition.

The constitutionality of the *amended* sections was challenged — and upheld — only two years later. *Glass v. Prudential Ins. Co. of America*, 246 Ala. 579, 22 So. 2d 13, (1945) (superseded by statute on other grounds as recognized by *Mooney v. Weaver*, 262 Ala. 392, 79 So. 2d 3 (1955)). *Glass* involved a "bill in equity" filed by Prudential Insurance Company ("Prudential"), a foreign corporation, "against Brooks Glass, superintendent of Insurance of the State of Alabama" ("the superintendent"). 246 Ala. at 580, 22 So. 2d at 14. The complaint sought a judgment declaring that "a privilege or license tax" imposed upon it violated the Commerce Clause, and enjoining the superintendent from cancelling Prudential's business license for nonpayment of

the tax. 246 Ala. at 581-82, 22 So. 2d at 14. The trial court issued a temporary injunction, and the superintendent appealed. 246 Ala. at 582, 22 So. 2d at 14.

The issue was whether Prudential had an adequate remedy at law. The resolution of that issue turned on whether the 1943 amendments had cured the constitutional deficiency found to exist in *Raible.* This Court held that they had. Accompanying the holding was an extended discussion of the effect of the amendments on the *Raible* holding:

> "The Legislature attempted in what is now §§ 890 and 891, Title 51, Code 1940, to provide a remedy for a refund of the taxes so paid, if found to be illegally exacted of the taxpayer. This court in considering these provisions which were formerly §§ 379 and 380, General Acts 1935, p. 568, concluded and so held that the plan therein outlined contravened Art. 1, § 14, Constitution of 1901, to the effect that the State of Alabama should never be made a defendant in any court of law or equity. *Raible Co. v. State Tax Commission*, 239 Ala. 41, 194 So. 560. . . . In discussing the invalidity of the refund statute as found in §§ 890 and 891, supra, *this court laid stress upon the fact that the taxes paid under protest were to be distributed to the various governmental agencies* and that upon a judgment being rendered as to the illegality of the taxes, the same were to be repaid by the State or the agencies receiving the same. *In an effort to remedy the difficulty as found by the court of the refund statute of 1935*, the

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Legislature amended §§ 890 and 891, supra, by an act approved July 10, 1943, General Acts, 1943, p. 369, which amendatory statutes now appear in the 1943 Cumulative Pocket Part, Code 1940, as §§ 890 and 891. If these amended statutes are held to be valid, we are of the opinion that they present a plain and adequate remedy at law. They are designed to cover license taxes of this nature. The amended § 890 gives the taxpayer who claims that the tax is either excessive or invalid in whole or in part, the right to pay such tax under protest, with the duty of the official receiving the same to note on the receipt that it was so paid under protest. Within sixty days after the protest payment, the taxpayer must commence suit against the officer for the recovery of such excessive or invalid tax, as the case may be, and unless the suit is commenced within that period of time, the taxpayer should be deemed to have waived the payment under protest and to thereby become a voluntary taxpayer. If suit is filed for the recovery of any tax paid under protest within the prescribed time and it is determined that the tax so paid was excessive or illegal, it should be refunded as provided in amended § 891. This amended section requires that the officer receiving the money which is paid under protest shall certify such sum of money to the State Treasurer with notice to the Treasurer it was paid under protest by the identified taxpayer and the Treasurer is required to hold such sum of money in an identified suspense account until it is judicially determined

whether the tax was legally collected or the taxpayer abandons recovery of the money by failure to bring suit within the period of sixty days after payment thereof. The Treasurer is required to give notice to the Comptroller that such sums were set up in a suspense account and are, therefore, not available for allotment, allocation or disbursement until the validity of the tax is determined by the court. If in the suit brought by the taxpayer it is determined that any portion of the tax paid under protest was excessive or illegally assessed or collected, the Comptroller shall issue his warrant upon the Treasurer for a refund of such sum.

". . . .

"The question of difficulty, however, arises out of the contention that the amended statutes (§§ 890 and 891) are *still* invalid as violative of Art. [I], § 14, of the Constitution, prohibiting a suit against the State. . . . Amended §§ 890 and 891, the substance of which has hereinbefore been stated, constitute a remedy in the nature of a *declaratory judgment.* The money paid under protest is *not to be mingled with the general funds of the state. It is not to be allocated or disbursed.* It must be identified and held in the nature of a trust fund, awaiting the determination of the court as to the legality of the tax. . . . In *Curry v. Woodstock Slag Corporation*, 242 Ala. 379, 6 So. 2d 479, 480 [(1942)], this court entertained

a declaratory judgment suit against the Commissioner of Revenue for the State of Alabama, as the chief executive officer of the State Department of Revenue. The purpose of the bill was to have determined in advance the construction and validity of the statutes applicable to the sales tax. It was clear that in that case the complainant had no plain and adequate remedy at law and the court there observed: 'It is not at all the necessary consequence of a suit to settle an actual controversy with such an officer before the deed is done that it be in essence one against the State. An officer is often confronted with the problem of what the law means which requires certain acts on his part and whether it is valid. . . . When such a controversy arises between him and an individual the Declaratory Judgments Act furnishes the remedy for or against him. When it is only sought to construe the law and direct the parties, whether individuals or State officers, what it requires of them under a given state of facts, to that extent it does not violate section 14, Constitution.' It is difficult to distinguish the holding in the *Curry* case in principle from that here involved in considering amended §§ 890 and 891. . . . If the tax is determined to be invalid, complainant would have been entitled to his refund. *There is no judgment rendered against the State or against the officer collecting the money.* It is in substance and effect *the same as a declaratory judgment, which was declared available to the taxpayer in the* Curry *case.*

> The one is in advance while the other is after the tax is due. The matters looking to a refund of the money call only for performance of ministerial duties and it will be assumed, of course, that the officer will perform his duty, but if he fails to do so, a writ of mandamus would be available.
>
> ". . . .
>
> ". . . [W]e are impelled to the conclusion that a provision in a refund statute requiring a fund held separate and apart, not to be allocated or distributed pending the question of the determination of the legality of the tax, *is a matter of some materiality.*"

246 Ala. at 582-86, 22 So. 2d at 15-18 (emphasis added).

The holdings and rationales of *Raible* and *Glass* material to this case may be summarized as follows: First, § 14 barred a direct action against the State for a tax refund. Second, an action to determine the disposition of funds held in escrow was in the nature of a declaratory judgment, and, therefore, was not a direct action against the State. Compliance with the statutory procedure for obtaining a refund of payments made pursuant to an illegal tax was, therefore, necessary and jurisdictional.

Raible has never been overruled or limited. In fact, it was cited by this Court twice last year. *Larkins v. Department of Mental Health & Mental Retardation*, 806 So. 2d 358, 364 (Ala. 2001); *Alabama State Docks Terminal Ry. v. Lyles*, 797 So. 2d 432, 435 (Ala. 2001).

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B. Appeal From a Final Assessment

Act No. 194 also provided for a refund in the event of a successful "appeal from any final assessment made by the [department of revenue] under any assessment required by law to be made by the [department of revenue]." Act No. 194, § 103, 1935 Ala. Acts 256, codified as amended at Ala. Code 1940, Tit. 51, § 140; Ala. Code 1975, §§ 40-2-22; repealed, Act No. 92-186, 1992 Ala. Acts 349, codified at Ala. Code 1975, § 40-2A-1 *et seq.* Section 40-2-22 provided, in pertinent part:

> "If any taxpayer against whom an assessment is made by the department of revenue under any assessment required by law to be made by the department of revenue is dissatisfied with the final assessment as fixed by the said department of revenue, he may appeal from said final assessment to the circuit court of Montgomery county . . . by filing notice of appeal with the secretary of the department of revenue and with the clerk or register of the circuit court of the county to which the appeal shall be taken within 30 days from the date of said final assessment made and entered on the minutes of the department as required by law and, in addition thereto, by giving bond conditioned to pay all costs to be filed with and approved by the clerk or register of the court to which the appeal shall be taken. The taxpayer shall pay the assessment so made before the same shall become delinquent; and, if such taxes are not paid before the same becomes delinquent, the court

> shall upon motion ex mero motu dismiss such appeal, unless at the time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the clerk or register of the court to which the appeal shall be taken in double the amount of the taxes payable to the state of Alabama, conditioned to pay all taxes, interest and costs due the state, county or any agency or subdivision thereof. . . . If upon such appeal the assessment made by the department of revenue is reduced, the court, upon proof of payment of said tax, shall ascertain and recite such fact in the judgment and shall ascertain and determine by its judgment, the amount of tax which was invalid or which was excessive . . . as to the amount paid to the state . . . ; and, upon presentation of a certified copy of the judgment to the comptroller, *it shall be the duty of the comptroller to draw his warrant on the treasurer in favor of such taxpayer for such an amount as the judgment of the court shall ascertain and declare has been erroneously paid to the state, together with interest from date of payment, and such warrant of the comptroller shall be paid out of any funds in the treasury as a current obligation of the year in which said refund is ordered.*"

(Emphasis added.)

"The right of appeal [was] clearly statutory and [could only] be exercised in the mode and within the prescribed time." *Sparks v. Brock & Blevins, Inc.*, 274 Ala. 147, 149,

145 So.2d 844, 846 (1962). "[A] final assessment of the Department of Revenue unappealed from [was] as conclusive as a judgment of a circuit court of Alabama, and [could] be impeached only by a direct proceeding not being subject to collateral attack." 274 Ala. at 149, 145 So. 2d at 846. "Section 40-2-22 [was] jurisdictional; a failure to comply with its requirements [prevented] the circuit court from having jurisdiction to entertain the appeal." *State Dep't of Revenue v. Estate of Hill*, 505 So. 2d 1240, 1240 (Ala. Civ. App. 1987); see also *Dowda v. State*, 274 Ala. 124, 145 So. 2d 830 (1962). This was true even where the taxpayer challenged the constitutionality of the tax. *Radue v. Bradshaw*, 289 Ala. 481, 484, 268 So. 2d 760, 762 (1972); *Moore v. State Dep't of Revenue*, 447 So. 2d 744 (Ala. Civ. App. 1983). Neither § 40-2-22 nor the caselaw construing it contemplated a direct action against the State for a refund.

C. Mandamus Relief from Tax Paid Through Mistake

Additionally, in two former Code sections the Legislature provided an avenue of relief where the taxpayer had not received a final assessment. See Ala. Code 1975, § 40-1-34, repealed and superseded, Act No. 92-186, 1992 Ala. Acts 349, codified at Ala. Code 1975, § 40-2A-1 *et seq*; and Ala. Code 1975, § 40-18-43, repealed and superseded, Act. No. 92-186, 1992 Ala. Acts 349, codified at Ala. Code 1975, 40-2A-1 *et seq*. Section 40-1-34 provided:

> "Where any taxpayer in the payment of taxes or licenses which are paid directly to the department of revenue, by a mistake of fact or

law has paid an amount in excess of the amount due or has made an erroneous payment, the comptroller is authorized to draw his warrant on the treasurer in favor of such taxpayer, and the treasurer is authorized to pay such warrant for the amount of such overpayment or erroneous payment.

"Before any refund under this section can be made, the taxpayer, his heirs, successors or assigns shall file in duplicate a petition directed to the department of revenue, setting up the fact relied on to procure the refunding of the money erroneously paid. *Such application must be made within three years from the date of such payment.*

"The department of revenue shall examine said petition and the records of the department of revenue, and if the facts set forth in the petition are such as to entitle the petitioner to the refunding of the money as prayed for and the department of revenue, upon the evidence adduced, is satisfied that the petitioner is entitled to the refund as prayed for, *he shall so certify to the comptroller stating the amount to be refunded by the state, the particular fund on which such warrant shall be drawn and forward to the comptroller a copy of the petition with the certificate attached, and if the comptroller shall be satisfied that the petition is in form required by law, he shall draw*

> *his warrant on the treasurer as hereinbefore provided for the amount certified to him by the department of revenue.*"

(Emphasis added.)

Section 40-18-43, which provided for a refund of *income tax* paid "through mistake or error," defined the duties of the Department and the comptroller in a manner and with specificity similar to the description in § 40-1-34. Section 40-18-43 also specifically provided:

> "In the event the department of revenue fails or refuses to certify to the comptroller the amount of tax due to be refunded, or if it certifies a lesser amount than the taxpayer deems he is entitled to have refunded, *the taxpayer may institute a proceeding in the circuit court of Montgomery county in the nature of a mandamus* proceeding to require the department of revenue to certify, to the comptroller, the amount due to be refunded to such taxpayer."

(Emphasis added.)

The duties imposed on the Department, the comptroller, and the treasurer by §§ 40-1-34 and 40-18-43 were *ministerial* in nature. See *Sparks v. Louisville & Nashville R.R.*, 277 Ala. 25, 28, 166 So. 2d 865, 868 (1964). However, the right of taxpayers to invoke those statutes depended on the filing of refund petitions within three years of the payment of the challenged taxes. *Southern Natural Gas Co. v. State*,

261 Ala. 222, 228, 73 So.2d 731, 736-37 (1953); see also *Curry v. Johnston*, 242 Ala. 319, 6 So. 2d 397 (1942). Thus, for relief by a writ of mandamus, compliance with these sections was mandatory.

In short, nothing in the refund statutes discussed above, or in this Court's caselaw construing those statutes, suggests to the reasonable taxpayer that anything less than *strict statutory compliance* is sufficient to support a right to a tax refund from the State. This refund scheme was held to provide taxpayers a "plain, speedy and efficient remedy," within the context of the Tax Injunction Act, 28 U.S.C.A. § 1341. *Melof v. Hunt*, 718 F. Supp. 877 (M.D. Ala. 1989).

In apparent reliance on the rationale of *Sparks*, the Taxpayers contend that this action merely seeks the performance of a *ministerial act,* a species of relief not barred by § 14. See *Aland*, *supra*. A "duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance, *with such certainty that nothing remains for judgment or discretion.*" *Grider v. Tally*, 77 Ala. 422, 425 (1884) (emphasis added). "Official action, the result of performing a certain and specific duty arising from fixed and designated facts, is a ministerial act." *Id.*

During oral argument, counsel for the Taxpayers stated:

> "If it is a ministerial act for the Commissioner of Revenue to calculate the refund and issue the check, under the Taxpayer Bill of Rights and thus you are outside the prohibition of sovereign

> immunity, certainly, the same analysis has to hold true in the context of a direct action for a refund, because it is the same act. It is either a ministerial act and it is [permitted by § 14] or it is not."

At first glance, this argument seems plausible. Closer scrutiny, however, reveals its inherent weakness, namely, the Taxpayers' determination to ignore the TBOR and proceed *outside the statutory scheme.* To be sure, refunding taxes paid through a mistake or error is — in some contexts — a ministerial act, but it is so *only because the statutes make it so.* It is ministerial because of the specificity with which the Legislature defined the duties of the taxing officials.

The Taxpayers cannot have it both ways. They cannot bring themselves within the statutory framework for one purpose and exclude themselves for other purposes. If they would reap the benefits of the TBOR, they must likewise bear its burdens. Thus, the Taxpayers' reliance on the ministerial-act exception to sovereign immunity is misplaced.

The cases the Taxpayers cite are not contrary to these principles. Specifically, they cite *Mingledorff v. Vaughan Regional Medical Center, Inc.*, 682 So. 2d 415 (Ala. 1996); *White v. Sims*, 470 So. 2d 1191 (Ala. 1985); *Eagerton v. Williams*, 433 So. 2d 436 (Ala. 1983); and *Thorn v. Jefferson County*, 375 So. 2d 780 (Ala. 1979). Those cases are distinguishable, because they all involved disputes with *counties* over *ad valorem taxes.* However, counties do not enjoy immunity under § 14. *Ex parte Sizemore*, 611 So. 2d 1069, 1070 (Ala. 1993) (Houston, J., dissenting from quashing writ of certiorari to the Court of Civil Appeals).

They also cite *Graves v. McDonough*, 264 Ala. 407, 88 So. 2d 371 (1956). *Graves*, however, was a *declaratory-judgment* action arising out of a taxpayer's claim for a refund "of taxes paid . . . on an erroneous escape assessment made by the tax assessor on certain improvements to" real estate owned by the taxpayer. 264 Ala. at 408, 88 So. 2d at 372. Moreover, the Court particularly noted: "[The attorney general] is *not insisting* that this is a suit against the state in violation of section 14 of the Constitution." 264 Ala. at 409, 88 So. 2d at 373 (emphasis added).

The Taxpayers also rely on two recent opinions of the Court of Civil Appeals. *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470 (Ala. Civ. App. 1999); *cert. denied*, 529 U.S. 1022 (2000); and *Sizemore v. Rinehart*, 611 So. 2d 1064 (Ala. Civ. App. 1992), *writ quashed*, 611 So. 2d 1069 (Ala. 1993). *Monroe* and *Rinehart* were direct class actions seeking refunds from the State.

In *Monroe*, the Court of Civil Appeals reached the merits of a challenge to the constitutionality of Act No. 97-301, 1997 Ala. Acts 522, which retroactively barred taxpayers' rights to refunds of use taxes "paid on goods purchased from out-of-state vendors and delivered into Alabama," 749 So. 2d at 473, over the Commissioner's objection that that court lacked jurisdiction because the taxpayer had failed to comply with the Act. The court stated:

> "There are exceptions to the requirement that a taxpayer exhaust his administrative remedies. Where '[q]uestions of law and of statutory and

> *constitutional construction* preponderate over questions of fact,' a taxpayer is not required to exhaust its administrative remedies. *Mingledorff v. Vaughan Regional Medical Center, Inc.*, 682 So. 2d 415, 416 (Ala. 1996). Because Valhalla challenged the legal validity and the constitutionality of the use tax and Act No. 97-301, it was not required to exhaust its administrative remedies before resorting to the courts. The trial court had subject-matter jurisdiction of this action."

749 So. 2d at 473 (emphasis added). The Commissioner did not challenge that holding, because the court held in favor of the Department on the merits. Nevertheless, she contends that the jurisdictional issue in *Monroe* was wrongly decided.

The plaintiff class in *Rinehart* was comprised of "all former members of the United States Armed Forces or their survivors, who were subject to payment of Alabama state income tax on their military retirement benefits and survivor benefits, or who had previously paid [such tax]." 611 So. 2d at 1065. The action challenged the constitutionality of State statutes taxing the benefits received by the class differently than "retirement benefits" received by individuals "due to their state employment." *Id.*

The trial court held that the statutory scheme was "void and illegal as a violation of the constitutional doctrine of intergovernmental tax immunity." 611 So. 2d at 1066. It ordered refunds "of all [such] taxes paid within three years prior to the date that the class filed its complaint." *Id.* The Court of Civil Appeals affirmed.

Appendix A

This Court initially granted the Commissioner's petition for certiorari review. Subsequently, however, over the strenuous dissent of Justice Houston, the Court quashed the writ as improvidently granted. *Ex parte Sizemore*, 611 So. 2d at 1070 (Houston, J., dissenting). Justice Houston reasoned that an action seeking a refund of income taxes paid on retirement benefits was an impermissible "action against the state, seeking as a remedy funds from the state treasury." *Id.* at 1070.

It is a familiar principle of law that "[a] denial of certiorari should never be considered as an expression by the reviewing court on the merits of the controversy." *Ex parte Jefferson County Dep't of Human Res.*, 555 So. 2d 1077, 1077 (Ala. 1990); *Ex parte Buse*, 549 So. 2d 1344, 1344 (Ala. 1989); *Ex parte Ford*, 514 So. 2d 1060 (Ala. 1987); *Ex parte Glasco*, 513 So. 2d 61, 6a (Ala. 1987); *Ex parte McDaniel*, 418 So. 2d 934, 935 (Ala. 1982); *Causey v. State*, 374 So. 2d 413, 414 (Ala. 1979). See also *Hamilton Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251 (1916). Litigants who rely on opinions of intermediate appellate courts that conflict with opinions of the jurisdiction's highest court do so at their own risk. Cf. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 n.9 (1930); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1351 (Fed. Cir. 2000), *cert. denied sub nom., Smurfit-Stone Container Corp. v. United States*, 532 U.S. 971 (2001).

Moreover, *Monroe* was decided in 1999. Thus, it could provide no basis for an action commenced in 1996, as this one was. We hold that compliance with the TBOR is the exclusive means to a franchise-tax refund, and we hereby overrule *Monroe* and *Rinehart* to the extent that they are

inconsistent with this holding. Our holding is compelled by our sovereign- immunity jurisprudence and does not constitute a *Reich* "bait-and-switch." The reasonable taxpayer contemplating a forum for franchise-tax refunds had no reason to believe that a direct action against the State was permitted under Alabama law. The TBOR is *jurisdictional on its face.* See § 40-2A-7(c)(5)c.; § 40-2A-9(g)(1).

In this connection, the Commissioner asserts that approximately 2,500 foreign corporations — including the plaintiffs in *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999) —have properly invoked the TBOR in their quest for refunds. For all that appears, ACC may still prosecute its *individual* claim for refunds in the proceeding it commenced under the TBOR before it joined this action. What the Taxpayers may *not* do is prosecute *this* action.

Federal due process does not require Alabama to permit a direct action against the State for a tax refund. *South Cent. Bell Tel. Co. v. State*, 789 So.2d 147, 149 (Ala. 2000) (under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), it is not a violation of due process for a State to "bar[] a refund to a taxpayer that did not follow a state procedural law in seeking the refund"). Cf. *Waldron v. Collins*, 788 F.2d 736 (11th Cir.) (Tax Injunction Act does not require states to provide taxpayer relief through a class action); *Melof v. Hunt*, 718 F. Supp. 877, 884 (M.D. Ala. 1989) (same).

III. Conclusion

For the foregoing reasons, we hold that the Taxpayers' class action seeking a refund of franchise taxes paid pursuant to Alabama's invalid statutory scheme is an action against the State as that concept is expressed in § 14. If, "at any stage of the proceedings," the trial court, or this Court, "becomes convinced that [the action] is a suit against the State and contrary to Sec. 14 of the Constitution," it must dismiss the action. *Aland v. Graham*, 287 Ala. 226, 229, 250 So. 2d 677, 678 (1971). Because the circuit court was without jurisdiction to entertain this action, we vacate the trial court's class-certification order and dismiss the action.[3]

ORDER VACATED; ACTION DISMISSED.

Moore, C.J., and Houston, Lyons, Brown, Johnstone, Harwood, and Stuart, JJ., concur.

See, J., recuses himself.

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3. In *Ex parte Monroe*, 723 So. 2d 15 (Ala. 1998), the first appeal of this action, this Court was not apprised of Gladwin's failure to proceed under the TBOR. Thus, the Court had no reason to suspect the absence of subject-matter jurisdiction.

APPENDIX B — ORDER AND MEMORANDUM OPINION OF THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA DATED JUNE 13, 2001

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CV 96-1065-GR

GLADWIN CORPORATION, et al.,

Plaintiffs,

v.

MICHAEL L. PATTERSON, as Commissioner for Department of Revenue for the State of Alabama,

Defendant.

ORDER AND MEMORANDUM OPINION ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs have moved to have this action certified as a Rule 23(b)(3) class action. Pursuant to Ala. Code § 6-5-641, the Court has considered all evidence, briefs and arguments submitted by the parties in support of and in opposition to class certification, in entering this Order and Memorandum Opinion.

Appendix B

I. HISTORY OF FRANCHISE TAX LITIGATION AND THIS ACTION

This action is one of approximately one hundred (100) cases currently pending in the Circuit Court of Montgomery County, Alabama, in which corporations are contesting payments of foreign franchise taxes made by them pursuant to former Ala. Code § 40-14-41. The constitutionality of that tax had been upheld in *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied sub nom., Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990). In that case, the Supreme Court of Alabama held that the franchise tax was constitutional and that it did not impermissibly discriminate against interstate commerce or foreign taxpayers.

Eight years later, in *South Central Bell Telephone Co. v. State*, 711 So. 2d 1005 (Ala. 1998), the Supreme Court of Alabama, citing *Reynolds Metals,* affirmed the trial court's dismissal, based on res judicata, of claims seeking refunds of the franchise taxes they had paid.

An appeal was taken and certiorari was granted. The United States Supreme Court found that this tax violated the Commerce Clause of the federal constitution in *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999). The case was remanded to the Alabama Supreme Court, which subsequently was to consider what remedy, if any, was available to the plaintiffs in *South Central Bell.* The Alabama Supreme Court never reached a final decision with respect to the remedy issue because the parties settled and the appeal was dismissed.

Appendix B

After the *South Central Bell* decision was issued, the Alabama legislature replaced the foreign franchise tax, effective January 1, 2000, with a new tax structure designed to equalize the taxes imposed on foreign and domestic corporations.

This action was filed by Gladwin Corporation ("Gladwin"), on May 24, 1996, in both its individual capacity and on behalf of a class of foreign corporation taxpayers. Gladwin challenged the constitutionality of the foreign franchise tax and requested refunds of franchise taxes that had been collected. In the meantime, a number of other franchise taxpayers filed suit in Montgomery County Circuit Court. These cases were stayed during the appeal of *South Central Bell* as well as during the remand pending a final decision with regard to the remedy issues. When it was evident that no final decision with respect to the remedy issue would be forthcoming in *South Central Bell*, this Court on September 12, 2000, held a scheduling conference pursuant to Ala. Code § 6-5-641(b), and entered an Order allowing the parties until November 1, 2000, to amend pleadings or add parties. In addition, a hearing on class certification was scheduled for January 31, 2001.

On or about November 1, 2000, Plaintiff Gladwin and two Plaintiffs new to this action, Jefferson Smurfit Corporation (U.S.) ("Jefferson Smurfit") and Arizona Chemical Company ("Arizona Chemical"), filed a Motion To Amend Complaint, which was granted. Plaintiffs' Amended Class Action Complaint sought the certification of a class consisting of "all foreign corporations subjected to tax liability or assessment under Ala. Code, § 40-14-41

during the most extensive period permitted by the applicable statute of limitations up through and including tax year 1999."

On January 26, 2001, Plaintiffs filed their Memorandum of Law in Support of Class Certification, asking that an opt-out class be certified pursuant to Ala. R. Civ. P. 23(b)(3). The class definition proposed by Plaintiffs was as follows:

> All foreign corporations or entities—other than those who were parties to *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 119 S. Ct. 1180 (1999) — who: (a) on or after May 24, 1993, filed tax returns for any tax year with respect to the foreign franchise tax set forth in Ala. Code § 40-14-41; or (b) on or after May 24, 1994, paid foreign franchise taxes for any tax year pursuant to Ala. Code § 40-14-41; or (c) for any tax year, have been assessed, but have not paid, foreign franchise taxes as set forth in Ala. Code § 40-14-41, or are currently the subject of any audit, assessment or collection proceedings pertaining to the foreign franchise tax set forth in Ala.Code § 40-14-41.

At the evidentiary hearing held on January 31, 2001, the parties submitted evidence and argued in support of and in opposition to class certification. Following the evidentiary hearing, Plaintiffs submitted their Corrected Memorandum of Law in Support of Class Certification, in which the Plaintiffs expanded the class definition to also include foreign corporations or entities who:

(d) on or before May 24, 1996, had filed petitions for refund of foreign franchise tax with the Alabama Department of Revenue, pursuant to Ala. Code § 40-2A-7(c) for any prior tax years and (i) whose petitions had not been denied, by operation of law or otherwise, as of May 24, 1996 or (ii) whose petitions were denied, by operation of law or otherwise, on or after May 24, 1994.

Having considered all evidence and argument presented by the parties, the Court is now required to conduct a "rigorous analysis" to determine whether Plaintiffs have proved their entitlement to class certification under Ala. R. Civ. P. 23(b)(3). However, prior to addressing the substantive issues, the Court must first address the Defendant's Motion To Dismiss and the Alabama Taxpayer Bill of Rights and Uniform Revenue Procedures Act ("Taxpayer Rights Act").

II. MOTION TO DISMISS AND TAXPAYER RIGHTS ACT

Defendant has moved to dismiss Plaintiffs' claims on both procedural and jurisdictional grounds. The Court will first address the grounds raised that apply to Jefferson Smurfit. Defendant moves that it be dismissed pursuant to Ala. Code, § 6-5-440, which states that a plaintiff is not entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party.

Jefferson Smurfit filed an individual action against Defendant (*Jefferson Smurfit v. Department of Revenue*, CV-1998-3391-PR), on December 22, 1998, in the Circuit

Court of Montgomery County, of which this Court takes judicial notice, challenging the constitutionality of the foreign franchise tax.

Jefferson Smurfit filed its separate case after *Gladwin* was filed and prior to any class certification. Moreover, it specifically referred to the *Gladwin* case in its complaint and adopted the arguments and grounds advanced in *Gladwin* and that case is still pending.

On October 31, 2000, Jefferson Smurfit was added as a named Plaintiff and class representative in this action but it continued to file pleadings in CV-98-3391-PR. On January 31, 2001, Jefferson Smurfit asked that court to continue to hold its individual case on the Administrative Docket.

This Court is of the opinion that Jefferson Smurfit is precluded from prosecuting claims in this case individually and as a class representative while simultaneously pursuing its claims in a separate action and, therefore, the motion to dismiss is due to be granted as to Jefferson Smurfit. Of course, this case is brought pursuant to Rule 23(b)(3), and Jefferson Smurfit would certainly have the option of either pursuing its individual claim or becoming a member of the class action.

Defendant also contends that this Court does not have jurisdiction based on failure to exhaust administrative remedies pursuant to § 40-2A-7 of the Taxpayer Rights Act. There are two different procedures outlined in § 40-2A-7, Code, for challenging the amount of tax that a taxpayer is required by the Alabama Department of Revenue ("Department") to pay. To be eligible to pursue the procedures

provided in § 40-2A-7, a taxpayer must (1) appeal from the entry of a final assessment, and/or (2) file a petition for refund and appeal its denial.

While virtually all of the taxpayers' individual court actions were appeals from final assessments or appeals from the denial of petitions for refund under Ala. Code § 40-2A-7 or its predecessor statutes, Gladwin filed its action without following any administrative procedures for requesting a tax refund. In addition, *Gladwin* was the first of the actions involving the constitutionality of the former franchise.

Arizona Chemical has pursued administrative remedies and has filed an appeal from the denial of a petition for refund in the Administrative Law Division of the Department of Revenue where it is still pending. Thus, neither Gladwin nor Arizona Chemical have invoked the jurisdiction of this Court pursuant to the procedures set forth in § 40-2A-7. Failure to follow mandatory administrative procedures can result in dismissal of the action for want of subject matter jurisdiction.

In *Thorn v. Jefferson County*, 375 So. 2d 780 (Ala. 1979), a class consisting of taxpayers seeking refunds of *ad valorem* taxes was certified. In that case, the court held that taxpayers did not have to pursue any statutory remedies because the assessment was void and illegal. And in *Monroe v. Valhalla Cemetery Co., Inc.*, 749 So. 2d 470 (Ala. Civ. App.) *cert. denied* (Ala. 1999) and *cert. denied* 120 S. Ct. 1426 (2000), it was held that it was not always necessary for taxpayers to exhaust the administrative remedies set forth in the Taxpayers Bill of Rights when challenging a tax as unconstitutional.

Based on the foregoing, the Court is of the opinion that it is not necessary to pursue or exhaust any statutory remedies when an assessment is unconstitutional and that it has jurisdiction over these parties and this matter. Furthermore, Arizona Chemical should not be penalized for being in the process of pursuing administrative remedies and its claims should not be abated. The Court will address the different postures of these two parties in detail in the Rule 23 portion of this order.

With regard to the remaining grounds for dismissal, suffice it to say that Plaintiffs have stated a cause of action. And as to sovereign immunity, the Court is of the opinion that Plaintiffs' claims would not be barred, at this time, based on the record before it. The Court is mindful that Defendant would continue to assert this defense during a trial on the merits.

III. POSITIONS OF PARTIES

Plaintiffs assert that the U.S. Supreme Court's decision in *South Central Bell* is determinative of the constitutionality issue, while Defendant claims that he should be allowed the opportunity to defend the constitutionality of the former franchise tax and to submit evidence not available in the record before the U.S. Supreme Court when it decided *South Central Bell.* Likewise, Plaintiffs assert that the decision of the U.S. Supreme Court should be applied retroactively, while Defendant argues that only prospective application is appropriate, even if *South Central Bell* is determinative of the constitutional issue.

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Plaintiffs also assert that the only appropriate remedy is a refund of franchise taxes paid by foreign corporations. Defendant's response to Plaintiffs' request for refunds is two-fold. First, Defendant maintains that the only remedy that could be available to Plaintiffs and other taxpayers is due process, and that due process was afforded taxpayers through the availability of a predeprivation procedure whereby taxpayers could challenge the constitutionality of a tax without paying the tax, and raise unconstitutionality as a defense to an assessment entered against the taxpayer by the State. On this issue, Plaintiffs counter that even if an adequate predeprivation procedure was available, the State also provided taxpayers with the option to pay the tax and seek a refund later, either by filing a petition for refund under Ala. Code § 40-2A-7(c), or by filing a lawsuit directly with this Court. Defendant replies that if a postdeprivation hearing was available for seeking refunds, this Court has subject-matter jurisdiction only over those taxpayers that properly followed the administrative procedures set forth in Ala. Code § 40-2A-7(c) for requesting a refund of taxes and filed a timely appeal to this Court.

With respect to Plaintiffs' request for refunds, Defendant also contends that under no circumstances are all taxpayers entitled to a full refund of franchise taxes they paid, but at most a refund necessary to eliminate any competitive disadvantage a taxpayer experienced vis-à-vis that taxpayer's domestic corporation competitors. Therefore, Defendant argues that only foreign taxpayers with domestic corporation competitors could possibly be entitled to a refund, and then only to a refund of any amount in excess of what the foreign corporation would have paid if taxed like a competing domestic corporation.

The Court is aware of the differences in the positions of the parties. However, at this time the issue is whether to certify a class and define any class, or subclass, that may be appropriate. Therefore, the Court need not address or decide these contentions at this juncture.

III. RULE 23(a) REQUIREMENTS

In order for this Court to certify this case as a class action, the Court must find that all of the factors in Ala. R. Civ. P. 23(a) have been established. Specifically, Ala. R. Civ. P. 23(a) requires that, in order to certify a class, this Court must find: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. In addition, Plaintiffs, who are seeking certification, have the burden of coming forward with proof that each of the factors of Ala. R. Civ. P. 23(a) have been established.

In *Cheminova America Corp. v. Corker*, 2000 WL 869569 (Ala.) the Supreme Court of Alabama set out a blueprint for the proper analysis of motions for class certification. And as set forth below, the Court has engaged in a rigorous analysis of each factor of Ala. R. Civ. P. 23(a) and 23(b)(3) and finds that all of the factors have been established. Ala. Code § 6-5-641(e).

Appendix B

A. Numerosity

The first explicit requirement of Rule 23(a) is the numerosity requirement: the class must be so "numerous that joinder of all parties is impracticable." Ala. R. Civ. P. 23(a)(1). The Court finds, based on the evidence submitted by the plaintiffs, approximately 18,000 taxpayers have paid the Alabama foreign franchise tax during the relevant time period.[1]

Defendant has admitted that the numerosity requirement is met if all foreign franchise taxpayers are in one class, as Plaintiffs have proposed. Although the Plaintiffs did not request the Court to create a subclass, it is of the opinion that it would be appropriate to establish a subclass pursuant to 23(c)(4)(B). This would be particularly helpful when addressing those factors set forth in *South Central Bell* which should be taken into consideration in a remedy phase. Furthermore, the numerosity requirement is also satisfied as to the subclass.

More specifically, the Court finds it would be appropriate to divide the primary class into a subclass, Subclass A, that would be composed of class of taxpayers, such as Arizona Chemical, who have invoked the administrative process. The evidence showed that there were approximately 100 taxpayers who petitioned the Department of Revenue for refunds and appealed the denial of their petitions to the Circuit Court of Montgomery County. In addition, approximately 350 taxpayers have petitioned the Department

1. Discussion of the relevant time period is deferred to discussion of the class definition, *infra*.

of Revenue for refunds and appealed the denial of their petitions to the Administrative Law Division of the Department, *see* Pltfs. Ex. 107 (circuit court cases); Pltfs. Ex. 108 (Administrative Law Division cases).

Based on the number of taxpayers who have pursued administrative remedies, the numerosity requirement would also be met within the subclass. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (as a general rule, classes of more than 40 deemed to satisfy numerosity requirement); *Faulk v. Home Oil Co., Inc.*, 184 F.R.D. 645 (M.D. Ala. 1999) (class of approximately 195 satisfied numerosity requirement); 5 James W. Moore, et al., *Moore's Federal Practice*, § 23.22[3][a] (3d ed. 1997).

B. Commonality

1. Rule 23(a) also has a commonality provision, requiring that "common questions of law and fact" must govern the plaintiffs' claims. Ala. R. Civ. P. 23(a)(2). Here, there is one overriding common question present and applicable to all class members, including the subclass. The principle common question is whether taxpayers who paid an unconstitutional tax are entitled to refunds. The Court also finds that other common questions of law exist for all members of the class and subclass and has taken into consideration the positions of the parties, including Defendant's claim that he should be allowed to defend the constitutionality of the former franchise tax and submit evidence not available in the record before the U.S. Supreme Court.

Thus, there are at least the following issues common to the class and subclass: (a) whether the foreign franchise tax was held by the U.S. Supreme Court to be unconstitutional on its face; (b) whether refunds are required as the only available method of affording a meaningful backward-looking relief for the unconstitutional collection of the foreign franchise tax; (c) whether taxpayers are required to exhaust administrative remedies before suing or participating in a class action suit for refunds; (d) whether taxpayers are required to show economic disadvantage in order to demonstrate their entitlement to refunds, (e) what effect, if any, does Alabama's abatement statute have on the class claims of taxpayers. The Court defers to the section of this Order on predominance in its discussion of these common issues and their relationship to any individual issues in this case.

C. Typicality

The third requirement of Rule 23(a) is that the named Plaintiffs' claims be typical of the claims of the class. Ala. R. Civ. P. 23(a). The Alabama Supreme Court has explained that the typicality requirement "focuses on the interest of the class representative". *Cheminova* at p. 5.

The Court also finds that the claims of the two plaintiffs are typical of the claims of the class and subclass. A representative's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . [is] based on the same legal theory. *Cheminova,* supra. Here, the claims of the class representatives arise from the same practice or course of

conduct that gives rise to the claims of the class members because defendant collected or is seeking to collect the foreign franchise tax from each and every member of the class and subclass.

Furthermore, the claims of the named plaintiffs and the rest of the class and subclass all are based on the same legal theories: that the foreign franchise tax was unconstitutional; that those who paid it are entitled to meaningful backward-looking relief; and that in this case, such relief can be only in the form of refunds. Not only do the claims of the named plaintiffs arise from the same course of conduct that gives rise to the claims of the rest of the class, but, in addition, the defenses the defendant seeks to raise as to the named plaintiffs are typical of the defenses defendant would assert against the members of the class generally: *i.e.*, that plaintiffs, or some of them, failed to exhaust their administrative remedies and that such exhaustion is a prerequisite to the recovery of refunds; that plaintiffs are required to show that they were economically disadvantaged by the foreign franchise tax.

Moreover, the fact that one of the named plaintiffs has not pursued its administrative remedies and others have does not render either of the two named plaintiffs atypical. Rather, plaintiff Gladwin is typical of those class members who have not pursued administrative remedies, while plaintiff Arizona Chemical is typical of those who have. Thus, the two remaining named Plaintiffs are typical of the class and subclass, in that their claims all arise from the same course of conduct — the collection of illegal foreign franchise taxes.

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D. Adequacy of Representation

Rule 23(a)'s final requirement is the adequacy requirement, which contains two prongs: (1) whether the named Plaintiffs have interests antagonistic to those of the rest of the class; and (2) whether Plaintiffs' counsel are qualified, experienced and generally able to conduct the proposed litigation. *Cheminova,* supra. "Adequacy of representation requires that the class representative have common interests with unnamed members of the class and that the representative will vigorously prosecute the interests of the class through qualified counsel." *Cutler v. Orkin Exterminating Co., Inc.*, 770 So. 2d 67, 71 (Ala. 2000) (citations omitted).

The Court is also of the opinion that Plaintiffs satisfy this prong and that the named plaintiffs and their counsel will provide adequate representation. In analyzing the adequacy of the named plaintiffs, the Court must consider whether they have interests antagonistic to those of the rest of the class and subclass. *Cheminova*, at p. 6. As noted above, plaintiffs have demonstrated that the claims of the named plaintiffs are typical of the claims of the class and subclass. As a result, the interests of the named plaintiffs are aligned with the interests of the class generally, because they have the same interest in establishing the right to refunds as do other members of the class and subclass.

Defendant argues that there are individual issues that will overwhelm the common questions in this case. This argument, however, does not raise an issue of antagonistic interests between the named plaintiffs and the class as a whole

and subclass, and, accordingly, does not counter the evidence and arguments made by plaintiffs demonstrating that they are adequate representatives. Furthermore, there has been no evidence presented here that there are any antagonistic interests.

Nor does the fact that Arizona Chemical has pursued administrative remedies while Gladwin has not, mean that there is any antagonism among members of the class. The interests of the plaintiffs do not conflict. The position of those taxpayers who pursued administrative remedies is in no way impaired by inclusion of taxpayers who have not, nor would their position be improved by excluding such entities. Put another way, no class member has the opportunity to receive more from this case by excluding other class members; every class member can receive the full amount of whatever refund, if any, this Court ultimately determines it is entitled to.

Plaintiffs' proposed class counsel also are adequate. Plaintiffs are represented by a group of five law firms. Among them, these firms have extensive experience in class action litigation and in tax law and they are capable of representing the class more than adequately. *See* Pltfs. Ex. 121-129 (affidavits regarding qualifications of class counsel and curricula vitae).

A concern was raised about the firm of Bradley Arant Rose & White, LLP due to it also representing certain potential class members in individual proceedings seeking refunds of the foreign franchise tax. Robert K. Spotswood, a partner in Bradley Arant, represented in open court on behalf

of the firm, *see* Class Certification Hearing Transcript at 124:1-8, and again by sworn affidavit, *see* Spotswood Aff. filed Feb. 28, 2001, that, if the class is certified in this case, Bradley Arant will not represent any class members with respect to refunds of the foreign franchise tax, except through its representation of the class and will not represent, with respect to refunds of foreign franchise taxes, any class members who opt out of the class, so long as the class action is pending.[1] The Court finds these commitments sufficient to safeguard the interests of the class in being represented by counsel without any conflicts. The Court also finds that Bradley Arant's advice to certain of its clients that it would be prudent to file administrative petitions for refunds in the event a court determines that exhaustion of administrative remedies is required, in no way undermines that firm's vigorous assertion in this proceeding that such exhaustion is not required. The Court specifically finds that Bradley Arant can adequately represent the class and may properly be included among class counsel.

Moreover, because the Court finds that other proposed class counsel, including the law firms of Baxley, Dillard, Dauphin & McKnight and Whatley Drake L.L.C., do not suffer from any conflict of interest, that class counsel is adequate.

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1. Both Bradley Arant and Tanner & Guin L.L.C. may continue to represent individual clients outside this class action with respect to claims for refunds of the foreign franchise tax not included within the class definition or to the extent that the individual claims pursued are not raised in the class action complaint. The Court would also note that Tanner & Guin represented Jefferson Smurfit which has been dismissed which could effect their participation as class counsel.

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IV. RULE 23(b)(3) REQUIREMENTS

In addition, the Court must find that the factors in Ala. R. Civ. P. 23(b)(3) have been established. Rule 23(b)(3) requires that in order to certify a class pursuant to this subsection, this Court must find that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Under Rule 23(b)(3), "the plaintiff must produce evidence . . . that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Ex parte Green Tree Financial Corp.*, 723 So. 2d 6, 9 (Ala. 1998) (quoting Rule 23(b)(3)).

A. Predominance

The Court finds that, at this point in the case, the common issues in this case will predominate over any individual inquiries that may arise. Should the balance between common issues and individual ones shift as a result of subsequent legal rulings, the Court, as always, has the power to revisit the question of class certification. *See Forehand v. Florida State Hosp. at Chattahoochee*, 89 F.3d 1562, 1566-67 (11th Cir. 1996).

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As noted above, the Court found that there are several common issues and it now finds that these issues predominate over any individual questions. Common issues predominate over individual ones within the meaning of Ala. R. Civ. P. 23(b)(3) where the common questions constitute a significant part of individual class members' cases, *Cheminova*, supra. Where jury findings on common questions of fact and Court rulings on common issues of law will significantly advance the resolution of identical or substantially similar questions and issues which would require resolution in connection with individual claims, the common issues may be said to predominate. *Id.*

Moreover, individual issues pertaining to the computation of damages do not defeat class certification where the right of all the class members to recover turns on resolution of common questions. *See Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975); *Green v. Wolf Corp.*, 406 F.2d 291, 300-301 (2d Cir. 1968); *Ardrey v. Federal Kemper Ins. Co.*, 142 F.R.D. 105, 114 (E.D. Pa. 1992); *In re Data Access Sys. Sec. Litig.*, 103 F.R.D. 130, 142 (D.N.J. 1984); *Sanchez v. Lowell Lebermann, Inc.*, 79 F.R.D. 21, 24 (W.D. Tex. 1978); *see also DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171 (8th Cir. 1995).

Thus, to the extent that issues identified by defendant pertain to the computation of damages for individual class members, such issues do not provide a basis to deny certification.

In this case, the Court find that the common issues raised by plaintiffs constitute a significant part of individual class

members' cases. Therefore, rulings by this Court on common issues of law will significantly advance the resolution of identical or substantially similar questions and issues which would require resolution in connection with individual claims. *See Cheminova*, supra at p. 6.

Specifically, the Court finds that the U.S. Supreme Court decision in *South Central Bell* and the binding nature of that precedent will arise in every claim for refunds of the foreign franchise tax. Similarly, the question whether refunds are the required form of meaningful backward-looking relief must be addressed in every claim. So, too, the question whether each taxpayer must demonstrate that it was economically disadvantaged by the foreign franchise tax must be determined in each claim for a refund and thus is common to the entire class.

Defendant claims that three individual inquiries will overwhelm these common questions: (a) the need to exhaust administrative remedies; (b) the need for individual demonstrations of economic disadvantage; and (c) the need for each class member to demonstrate the amount of refund to which it is entitled. (Defendant also claims that the process of identifying the members of the class will overwhelm the common question and that issue is discussed separately, below.) The Court finds that none of these inquiries precludes certification.

As already noted, whether taxpayers were required to exhaust their administrative remedies is a question of law that is common to the claims of the class and subclass. Furthermore, even if exhaustion were required, determining

which taxpayers have exhausted their administrative remedies would not overwhelm the common questions, because the evidence shows that the computerized records maintained by defendant permit this question to be resolved easily. *See* Pltfs. Ex. 119 at 58:10-62:17; Pltfs. Ex. 107; Pltfs. Ex. 108.

Defendant also contends that each taxpayer must demonstrate individually the amount of the refund, if any, to which it is entitled. The Court finds that this inquiry affects only the computation of damages and does not impair certification of the class. The question whether each taxpayer is required to show that it was economically disadvantaged also is common to the claims of every class member. Presuming that the Court will answer this common question in the affirmative, defendant argues that the showing that would then be required will present overwhelming individual issues. But it is not necessary for this Court to resolve these issues at this time, *see Ex Parte Government Employees Ins. Co.*, 729 So. 2d 299, 303 (Ala. 1999); *see also Morrison v. Booth*, 763 F.2d 1366, 1371 (11th Cir. 1985), or to predict what effect future rulings may have on this action.

As noted above, if subsequent rulings change the balance of common and individual issues, the Court may revisit the question of class certification. *See Forehand*, 89 F.3d at 1566-67. At this point in the case, however, the question of whether each taxpayer must make the showing defendant claims will be required is a common one and the Court need not speculate about how that issue will be resolved.

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B. Superiority

The Court finds that a class action is superior to other available methods for the fair and efficient adjudication of this controversy. Included in the Court's analysis of this element of Ala. R. Civ. P. 23(b)(3) are the following factors: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The Court finds that a class action is the superior means of adjudicating this controversy because, unlike a series of individual actions, a class action will allow the foreign franchise tax refund issue to be resolved in one proceeding. Moreover, class-wide adjudication ensures equitable treatment of all entities that paid the tax. For these reasons, the Court finds that it is desirable to concentrate all of the litigation pertaining to refunds of the foreign franchise tax in one forum.

The Court also finds that a class action is the superior means of adjudicating this controversy because of the nature and extent of other litigation seeking refunds of the foreign franchise tax. There are approximately 100 actions pending in circuit courts seeking refunds of the foreign franchise tax and approximately 350 appeals seeking refunds pending in the Administrative Law Division of the Department of

Revenue. So far as it appears from the record, all of these actions seek refunds of the foreign franchise tax and all are based on the alleged unconstitutionality of the tax.

Moreover, a class action will avoid duplicative and possibly inconsistent adjudications of the common issues that will arise in every one of these claims for refunds of the foreign franchise tax, including the scope of the U.S. Supreme Court's ruling in *South Central Bell,* the appropriate means of remedying the unconstitutional foreign franchise tax, the elements that taxpayers must prove in order to recover refunds, the applicability (or inapplicability) of sovereign immunity, and the requirement (or not) that taxpayers must first exhaust administrative remedies.

Because of the number of these proceedings and the similarities among them, the Court finds that it would be a waste of judicial resources and time to require the important common questions presented in this case to be litigated separately in these hundreds of cases.

The Court further finds that class members have limited interest, if any, in individually controlling the prosecution of these actions. All taxpayers contend that they are entitled to refunds of the foreign franchise tax on the ground that the tax was unconstitutional. Because plaintiffs' legal theories are not based on individual characteristics of a particular taxpayer, there is no advantage to any particular taxpayer in making the argument in its own name.

Finally, the Court does not find any serious difficulties that are likely to be encountered in the management of this

class action. It appears that defendant's books and records, including computerized records, will make resolution of such individualized issues as may arise manageable. Moreover, most of the issues governing this case are legal, rather than factual issues, further making the case manageable in a class action format.

In this regard, the parties recognize that § 40-2A-7 is a factor that must be considered, although they disagree as to how it should be applied. Therefore, time limitations applicable to the petition for refund or contest of assessment procedures set forth in this section will be a factor. In addition, there are some taxpayers who have recognized that their claims are limited to particular tax years because of the untimeliness of a petition for refund. *See, e.g.*, Defendant's Exhibit 14. Moreover, a number of taxpayers, and at least two in pending cases, recognize that they are not entitled to a full refund but only the difference between that amount and the amount of franchise tax they paid as a foreign corporation. *See* Defendant's Exhibits 9 & 10. Other taxpayers have raised non-constitutional challenges to the foreign franchise tax. *See, e.g.*, Defendant's Exhibit 4.

However, it is not necessary, or appropriate to address these individual cases as this time and, of course, those taxpayer who are claiming different entitlement will have an opportunity to opt out of the class or subclass.

The Court is also mindful that there will be differences regarding when tax returns and payments are due and Plaintiffs acknowledge that the Court must define a class in a way that assures that the claims of the members of a class

are not barred by the applicable statute of limitations. However, the fact that there may be differences to consider when defining a class or fashioning a remedy does not defeat Plaintiffs maintaining this action.

V. The Class Definition

Having found that this case meets all the requirements for certification under Ala. R. Civ. P. 23(a) and 23(b)(3), the Court now turns to the definition of the class ("Primary Class") and subclass ("Subclass A") to be certified.

The Primary Class includes all taxpayers who paid the foreign franchise tax within the applicable limitation period and all corporate entities from whom the Department is attempting, or may in the future attempt, to collect the tax and who have not pursued any administrative proceedings.

The applicable limitation period is that set forth in Ala. Code § 40-2A-7(c)(2)a, pursuant to which a refund claim is timely if it is brought within (i) three years from the date that the return was filed, or (ii) two years from the date of payment of the tax, whichever is later, or, if no return was timely filed, two years from the date of payment of the tax. *See Thorn v. Jefferson County*, 375 So. 2d 780, 788 (Ala. 1979).

Pursuant to § 40-2A-7(c)(2)a, the Primary Class includes refund claims with respect to foreign franchise tax returns that were timely filed no more than three years before the date this action was commenced, that is, returns that were timely filed on or after May 24, 1993. The Court finds that

this portion of the Primary Class, denominated as subparagraph (a) in plaintiffs' proposed class definition, is identifiable from the records, including computer records, of the defendant as described in the deposition of Barry Estes. *See* Pltfs. Ex. 119 at 18:13-42:10.

Pursuant to § 40-2A-7(c)(2)a, the Primary Class includes refund claims with respect to foreign franchise taxes that were paid no more than two years before the date this action was commenced, that is, foreign franchise taxes that were paid on or after May 24, 1994. The Court finds that this portion of the class, denominated as subparagraph (b) in plaintiffs' proposed class definition, is identifiable from the records, including computer records, of the defendant as described in the deposition of Barry Estes. In particular, based on the testimony of Mr. Estes, the Court finds that each payment received by the Department of Revenue is coded with a control number that includes the year and the precise day of the year on which the payment was received, making determination of when taxes were paid a simple and mechanical inquiry. *See* Pltfs. Ex. 119 at 18:13-42:10.

The Primary Class also properly includes all taxpayers from whom defendant is still seeking or may seek in the future to collect foreign franchise taxes, denominated as subparagraph (c) in plaintiffs' proposed class definition. The corporate entities that are the subject of such collection procedures seek only injunctive relief with respect to taxes they have not paid. Because they seek to bar the defendant from assessing or collecting these taxes not yet paid, the limitation period applicable to claims for refunds does not apply.

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Subclass A includes taxpayers who filed refund petitions on or before the date on which this case was filed and whose petitions had not been denied when this action was filed or whose petitions had been denied (by operation of law or otherwise) on or after May 24, 1996. These claims are denominated as subparagraph (d) in plaintiffs' proposed class definition. Claims included within subparagraph (d) are timely, and thus are properly included in Subclass A, because taxpayers' time to appeal administrative denials of their refund petitions had not yet run at the time this action was commenced.

CONCLUSION

In entering this order, the Court has set forth time limitations on Defendant to deliver records and on Plaintiffs to submit a proposal of notice to class members. In this regard the Court has taken into consideration that there will likely be an appeal. Because of the significant impact this order could have on any refunding of foreign franchise taxes, the Court would invite an appeal so that the class issue could be resolved prior to any further proceedings.

The Court having determined that Plaintiffs have met their burden of coming forward with proof of each factor set forth in Ala. R. Civ. P. 23(a) and 23(b)(3), and the Court having engaged in the rigorous analysis required by Ala. Code § 6-5-641(e) and having determined that all of the requirements for certification have been met, it is hereby ORDERED as follows:

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1. That a Primary Class is certified consisting of: All foreign corporations or entities other than those who were parties to *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 119 S. Ct. 1180 (1999), and those who did not file refund petitions or pursue any administrative remedies, who:

> (a) on or after May 24, 1993, timely filed tax returns for any tax year with respect to the foreign franchise tax set forth in Ala. Code § 40-14-41;
>
> (b) on or after May 24, 1994, paid foreign franchise taxes for any tax year pursuant to Ala. Code § 40-14-41;
>
> (c) for any tax year, have been assessed, but have not paid, foreign franchise taxes as set forth in Ala. Code § 40-14-41, or are currently the subject of any audit, assessment or collection proceedings pertaining to the foreign franchise tax set forth in Ala. Code § 40-14-41.

2. That Subclass A is certified consisting of: All foreign corporations or entities other than those who were parties to *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 119 S. Ct. 1180 (1999), and who:

> (a) on or before May 24, 1996, had filed timely petitions for refunds with the Alabama Department of Revenue, pursuant to Ala. Code § 40-2A-7(c) for any prior tax years and (i) whose petitions had not been denied, by operation of law

or otherwise, as of May 24, 1996 or (ii) whose petitions had been denied, by operation of law or otherwise, on or after May 24, 1994.

3. That specifically excluded from the Primary Class and Subclass A, are (A) all taxpayers' claims for refunds of the foreign franchise tax that are the subject of any circuit court action filed prior to May 24, 1996; (B) all taxpayers excluded by previous order of a Court and (C) all taxpayers who are part of the Settlement Agreement filed on April 9, 2001.

3. That Gladwin Corporation and Arizona Chemical Company are the two named plaintiffs designated as class representatives.

4. That the law firm Kirby McInerney & Squire, LLP is designated as Lead Counsel for the Class and SubClass A and also designated are the law firms Bradley Arant Rose & White, LLP; Baxley Dillard Dauphin & McKnight; Tanner & Guin, L.L.C. and Whatley Drake, L.L.C. as Counsel for the Class and Subclass A.

5. That Defendant shall deliver to plaintiffs no later than ninety (90) days after the date of this order a list of class members drawn from the records, including the computerized records, of the Department of Revenue. Such list shall include the name of each taxpayer that falls within the Primary Class and Subclass A definition for any tax year, along with the last known address of that taxpayer, as shown in the Department's most updated record.

6. That Plaintiffs shall submit to the Court no later than ninety days after receipt of Defendant's list, a proposal for notifying class members of this certification and of their right to opt out of the class and/or subclass and shall include with their proposal the proposed form or forms of notice to be used. Defendant shall have thirty (30) days after Plaintiffs have filed their proposal to submit to the Court comments on it.

7. That in the event Plaintiffs and/or Defendant are not able to comply with the time limitations set forth, a status report shall be filed with the Court at that time.

Done this 13th day of June, 2001.

s/ Sally Greenhaw
SALLY GREENHAW
CIRCUIT JUDGE

APPENDIX C — PER CURIAM OPINION OF THE SUPREME COURT OF ALABAMA DATED OCTOBER 23, 1998

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1998-99

1961871

Ex parte H.E. MONROE, Jr., as commissioner of the Department of Revenue of the State of Alabama.

(Re Gladwin Corporation

v.

G. Sage Lyons)

(Montgomery Circuit Court, CV-96-1065)

PER CURIAM.

H.E. Monroe, Jr., as commissioner of the Department of Revenue of the State of Alabama, filed with this Court a document he styled as a "petition for extraordinary writ." In it, he asks us to direct the Montgomery Circuit Court to vacate its order requiring the commissioner to place franchise taxes collected pursuant to Ala. Code 1975, § 40-14-41, from foreign corporations doing business in Alabama, into an interest-bearing escrow account pending resolution of a challenge to the constitutionality of the statute authorizing the imposition of those taxes. This Court has treated

the commissioner's petition as a timely appeal from an interlocutory order granting an injunction, see Rule 4(a)(1)(A), Ala. R. App. P. We reverse and remand.

This case is another, and presumably the last, installment in litigation challenging the constitutionality of Ala. Code 1975, § 40-14-41. That section provides in part: "Every corporation organized under the laws of any other state, . . . and doing business in this state, except strictly benevolent . . . corporations, shall pay annually to the state an annual franchise tax of three dollars ($3) on each one thousand dollars ($1,000) of the actual amount of its capital employed in this state." The plaintiff in this litigation is a foreign corporation. It contends that § 40-14-41 imposes on foreign corporations doing business in Alabama a higher tax than is imposed on domestic corporations. Consequently, it contends, § 40-14-41 violates the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3,[1] in that it impermissibly burdens interstate commerce. It also contends that § 40-14-41 discriminates against it, in violation of the Equal Protection Clause of the Fourteenth Amendment.

These claims were first presented in *White v. Reynolds Metals Co.*, 558 So. 2d 367 (Ala. Civ. App.), *rev'd*, 558 So. 2d 373 (Ala. 1989), *cert. denied sub nom. Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990). That action was brought by Reynolds Metals Company, GMAC Leasing Corporation, General Motors Acceptance Corporation, and General Motors Corporation. 558 So. 2d at 368. After a

1. The Commerce Clause provides: "The congress shall have power to . . . regulate commerce . . . among the several states. . . ."

lengthy and thorough discussion, this Court held that § 40-14-41 did not violate the Equal Protection Clause or the Commerce Clause. *Id.* at 390.

While *White* was under appellate review, other actions challenging § 40-14-41 were initiated. One of those actions was brought by South Central Bell Telephone Company. That action was stayed pending the final disposition of *White*. Eventually, the stay was lifted and South Central Bell Telephone Company's action was consolidated for trial with similar actions brought by its successors or affiliates, namely, BellSouth Telecommunications, Inc., BellSouth Corporation, BellSouth Services, Inc., BellSouth Financial Services Corporation, BellSouth Advertising & Publishing Corporation, BellSouth Resources, Inc., BellSouth Products, Inc., Alabama Celluiar Services, Inc., Sunlink Corporation, and TechSouth, Inc.; and with an action brought by CSX Transportation, Inc., and its predecessor companies. (All these parties are collectively referred to hereinafter as "South Central Bell".) *South Central Bell Telephone Co. v. State*, 711 So. 2d 1005, 1005 n.1 (Ala. 1998) (no opinion; Maddox, J., concurring specially). The cases were tried on December 14-15, 1994.

On December 3, 1996, the trial court entered a judgment in favor of the commissioner, concluding that this Court's holding in *White* barred South Central Bell's claims on principles of *res judicata*. South Central Bell appealed. On March 20, 1998, this Court affirmed the judgment of the

trial court, without an opinion, citing *White* as the basis for its affirmance.[2] *South Central Bell Telephone*, 711 So. 2d at 1005.

On May 24, 1996, while *South Central Bell Telephone* was pending, Gladwin Corporation, a Delaware corporation, filed a complaint in the Montgomery Circuit Court on behalf of itself and all other corporations similarly situated. The complaint sought a judgment declaring § 40-14-41 "unconstitutional and void insofar as it discriminates against foreign corporations." It also sought "a permanent injunction against the collection of [the tax authorized by § 40-14-41]; and an order directing a refund of previously collected taxes, with interest and attorney fees and costs."

The commissioner moved the trial court to "stay the . . . [Gladwin] action and . . . place [it] on the Administrative docket pending the outcome of [*South Central Bell Telephone*]." That motion was granted on July 1, 1996. The commissioner notes that approximately 50 other actions involving this issue were likewise stayed pending the resolution of *South Central Bell Telephone*. Brief of Appellant, at p. 1.

Subsequently, Gladwin moved the trial court to conditionally certify the action as a class action and to "remove the case from the administrative docket and restore

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2. In addition to *White*, the Court cited Ala. R. App. P. 53(a)(2)(F). Rule 53(a) authorizes an affirmance without an opinion where this Court "concludes that the judgment or order was entered without an error of law," (a)(2)(F), and that "an opinion . . . would serve no significant precedential purpose," (a)(1).

it to its active docket." On June 12, 1997, the trial court granted Gladwin's motion for class certification. Gladwin also moved the trial court either (1) to prohibit the state "from collecting the foreign franchise tax imposed [by] § 40-14-41," or (2) to require the state "to pay the disputed tax into an escrow account until a final decision by the Alabama Supreme Court . . . on the issue of the constitutionality of [§ 40-14-41]."

On August 5, 1997, the trial court entered an order restoring the action to the active docket for purposes of discovery. It also ordered the state to "place any foreign franchise tax monies collected into an interest bearing escrow account until further order." The court stated:

> "[T]he court is of the opinion that the status quo should be preserved pending a decision by the Supreme Court of Alabama in the *South Central Bell* case. There . . . exists a reasonable probability of ultimate success on the merits of the case and no adequate remedy of law exists for the recovery of the taxes involved. Furthermore, the plaintiff would suffer immediate and irreparable injury if no remedy were provided. Finally, the court is of the opinion that the injunctive relief requested, placing the taxes collected into an escrow account, would preserve the status quo."

On August 14, 1997, the commissioner petitioned for an extraordinary writ requiring the trial court to vacate the injunction. On January 30, 1998, we stayed the preliminary injunction. We also informed the parties that the petition

would be treated as a timely appeal from an "interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction, or refusing to dissolve or modify an injunction." Ala. R. App. P. 4(a)(1)(A).

On appeal, the commissioner contends that the conditions precedent to the grant of a preliminary injunction are lacking, and, consequently, that the trial court erred in ordering the taxes placed into an escrow account. For a trial court to grant a preliminary injunction, the party seeking the injunction must show:

> "(1) that without the injunction the plaintiff would suffer immediate and irreparable injury; (2) that the plaintiff has no adequate remedy at law; (3) that the plaintiff has at least a reasonable chance of success on the ultimate merits of his case; and (4) that the hardship imposed on the defendant by the injunction would not unreasonably outweigh the benefit accruing to the plaintiff."

Perley v. Tapscan, Inc., 646 So. 2d 585, 587 (Ala. 1994).

Gladwin argues that it has made such a showing. As to the first item, in particular, Gladwin contends:

> "Plaintiff and all others similarly situated face an imminent risk of irreparable injury because the state has taken the position that even if the franchise tax is found to be unconstitutional, that ruling cannot be applied retroactively. Thus, *it is*

> *the state's position that taxes paid during the pendency of the litigation cannot be refunded even if the state ultimately loses. Plaintiff disagrees, and argues, infra Point III, that any ruling on the constitutionality of the franchise tax must be applied retroactively.*"

Brief of Appellee, at pp. 14-15 (emphasis added).

In the section of its brief to this Court headed "Point III," Gladwin argues that if the statute is determined to be unconstitutional, the state may be required to provide " 'meaningful backward-looking relief to rectify any unconstitutional deprivation,' " namely, "refunds." *Id.* at pp. 19-20 (quoting *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 39 (1990)). Additionally, it states:

> " '[N]o corrective action by the State could cure the invalidity of the tax during the contested tax period. *The State would have no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress,* because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back would be in contravention of the Fourteenth Amendment." ' "

Brief of Appellee, at p. 20 (quoting *McKesson, supra*, at 39) (emphasis added by Gladwin). As further support for this proposition, Gladwin cites other decisions from the United States Supreme Court, including *Newsweek, Inc. v. Florida*

Department of Revenue, __ U.S. __, 118 S. Ct. 904 (1998); *Reich v. Collins*, 513 U.S. 106 (1994); and *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993).

Gladwin's forceful arguments betray its contention that without the injunction it "face[s] an imminent risk of irreparable injury" if § 40-14-1 is ultimately held to be unconstitutional. In other words, Gladwin strenuously argues that it is entitled to the *full range of retroactive relief, including refunds,* if it prevails on the merits. Because it has thus failed to meet its burden of demonstrating to this Court that the elements necessary to support the injunction are satisfied, the order of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

PETITION TREATED AS APPEAL; REVERSED AND REMANDED.

Hooper, C.J., and Maddox, Shores, Houston, Kennedy, and Cook, JJ., concur.

See, J., concurs specially.

Almon, J., concurs in the result.

Lyons, J., recuses himself.

Appendix C

SEE, Justice (concurring specially).

I concur with the majority's conclusion that the trial court erred in entering a preliminary injunction requiring the commissioner of revenue to place franchise tax receipts from foreign corporations into an escrow account. I write specially to emphasize that although the plaintiff taxpayer, which is a foreign corporation, has demonstrated a likelihood of success on the merits, it has not demonstrated that, without the injunction, it will suffer an "irreparable injury."

To obtain a preliminary injunction, the applicant must show:

> "(1) [T]hat without the injunction the plaintiff will suffer immediate and *irreparable injury*; (2) that the plaintiff has no adequate remedy at law; (3) that the plaintiff is *likely to succeed on the merits* of the case; and (4) that the hardship imposed upon the defendant by the injunction would not unreasonably outweigh the benefit to the plaintiff."

Blaylock v. Cary, 709 So. 2d 1128, 1130 (Ala. 1997) (emphasis added). The plaintiff taxpayer has demonstrated that it is "likely to succeed on the merits" of its case. Its Dormant Commerce Clause challenge to Alabama's franchise tax system establishes that "[s]imply by changing its state of incorporation from Alabama to any other state, a corporation operating in Alabama subjects numerous additional items on its balance sheet (e.g., surplus, long-term debt) to Alabama franchise taxation. [Thus, t]he franchise tax facially

discriminates against interstate commerce. . . ." *South Central Bell Telephone Co. v. State*, 711 So. 2d 1005, 1010 (Ala. 1998) (See, J., dissenting), cert. granted, 67 U.S.L.W. 3001, 67 U.S.L.W. 3032, 67 U.S.L.W. 3186, 67 U.S.L.W. 3187 (U.S. Sept. 29, 1998) (No. 97-2045).

The plaintiff taxpayer has failed, however, to demonstrate an immediate risk of irreparable injury. The only damage it has suffered is excessive tax payments, that is, an economic loss, for which seeks money damages. See *Perley v. Tapscan, Inc.*, 646 So. 2d 585, 587 (stating that an "irreparable injury" is an injury that is not redressable in a court of law through an award of money damages). If the Supreme Court of the United States, or this Court, holds that Alabama's franchise tax system violates the Dormant Commerce Clause, then retroactive relief in the form of tax refunds would be available to those taxpayers that timely filed claims for refunds. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). Because the plaintiff taxpayer has not demonstrated that it will suffer an irreparable injury, it is not entitled to a preliminary injunction requiring the State to deposit the contested tax revenues into an escrow account.

APPENDIX D — ORDER OF THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA DATED AUGUST 5, 1997

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CV-96-1065-GR

GLADWIN CORPORATION,

Plaintiff,

v.

G. SAGE LYONS,

Defendant.

ORDER

This matter was before the Court on Plaintiff's Motion To Dissolve Stay Or Alternatively To Remove The Case From The Administrative Docket For Limited Purposes and Motion For Injunctive Relief. Present in Court at the date and time scheduled for hearing were the attorneys for the parties.

On July 1, 1996, the judge to whom the case was then assigned, without hearing, granted Defendant's motion to stay and placed this action on the administrative docket. The primary ground given for requesting a stay was that another case pending in the Circuit Court of Montgomery County, Alabama, *South Central Bell Telephone Company and CSX Transportation, Inc. v. Alabama Revenue*

Department, CV-89-2600-G, raised identical issues and the decision in that case would be dispositive of the instant litigation,

Subsequently, on December 3, 1996, Judge William Gordon issued an order in the *South Central Bell* case and it is presently on appeal. The taxpayers in *South Central Bell* were seeking refunds of taxes from 1986 through 1992. In 1989, the Supreme Court of Alabama in *White v. Reynolds Metals Co.* 558 So. 2d 373 (Ala. 1989), held that the franchise tax assessed on foreign corporations was constitutional. Judge Gordon dismissed the *South Central Bell* action as being barred by *res judicata* as the claims raised had been decided in *Reynolds Metal.* However, the trial court also addressed other issues, including the commerce clause of the Federal Constitution, and was of the opinion the franchise tax on foreign corporations violates the commerce clause.

Since the decision in *Reynolds Metal,* there have been several United States Supreme Court cases holding that a state's tax scheme cannot impose a burden on interstate commerce and it is discrimatory to impose a tax on a foreign corporation for no reason other than the state of incorporation. See e.g. *Fulton Corp. v. Faulkner*, 116 S. Ct. 848, (1996); *Oregan Waste Systems, Inc. v. Department of Environmental Quality*, 114 S. Ct. 1345 (1994).

In this action, Plaintiff, a foreign corporation, is seeking refunds of franchise taxes. This Court is mindful of the decision and *Reynolds Metal* and is aware that the decision in *South Central Bell* may impact this case. However, the Court is also of the opinion that the case should be restored

to the active docket although any ruling would be delayed until a decision is made in the *South Central Bell* case. Restoring the case to the active docket would give the parties an opportunity to conduct discovery and would assure that there would be no delay in addressing the issues here at the appropriate time.

In addition, the Court is of the opinion that the status quo should be preserved pending a decision by the Supreme Court of Alabama in the *South Central Bell* case. There may exists a reasonable probability of ultimate success on the merits of the case and no adequate remedy of law exists for the recovery of the taxes involved. Furthermore, the plaintiff would suffer immediate and irreparable injury if no remedy were provided. Finally, the Court is of the opinion that the injunctive relief requested, placing the taxes collected into an escrow account, would preserve the status quo.

Wherefore; it is hereby ORDERED as follows:

1. That this action is restored to the active docket and shall be set for status after a ruling is made by the Supreme Court of Alabama in *South Central Bell Telephone Company and CSX Transportation, Inc. v. State of Alabama, State Department of Revenue.*

2. That the Motion For Injunctive Relief is due to be granted and Defendant shall place any foreign franchise tax monies collected into an interest bearing escrow account, until further order of this Court.

Appendix D

3. That this Court specifically reserves jurisdiction over this action.

Done this 5th day of August, 1997.

s/ Sally Greenhaw
SALLY GREENHAW
CIRCUIT JUDGE

Supreme Court, U.S.
FILED
SEP 19 2002
CLERK

No. 02-0260

In The
Supreme Court of the United States

MILLCRAFT-SMS SERVICES, L.L.C.
and ARIZONA CHEMICAL CO.,

Petitioners,

v.

Cynthia UNDERWOOD, Commissioner of the Department of Revenue of the State of Alabama,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court correctly ruled that the State of Alabama enjoys sovereign immunity under § 14 of the Alabama Constitution from petitioners' direct class action seeking tax refunds, when the Alabama Legislature has prescribed a separate administrative process that a taxpayer must follow to obtain a tax refund.

2. Whether, when it followed Alabama statutes and its own unbroken line of precedent holding that a taxpayer may not sue the State directly for a tax refund, the Alabama Supreme Court denied petitioners due process through a "bait and switch," because an intermediate appellate court had twice contradicted these superior authorities and permitted taxpayers to bring direct actions for tax refunds.

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STATEMENT OF THE CASE

This case began in May 1996, when Gladwin Corporation filed a class action against the Commissioner of the Alabama Department of Revenue. Gladwin sought franchise tax refunds on behalf of all foreign corporations that had overpaid franchise taxes to the State of Alabama. Gladwin did not first seek, however, to obtain these refunds through the administrative process prescribed by the Taxpayers' Bill of Rights and Uniform Procedures Act ("the TBOR"), Ala. Code §§ 40-2A-1 to -15, 40-2A-7(c)(5)c. & -9(g)(1), which had been enacted in 1992.

The Alabama Supreme Court ruled in this case that Gladwin's failure to comply with the TBOR meant that the trial court lacked subject matter jurisdiction over Gladwin's suit. Absent strict compliance with the administrative process mandated by statute for obtaining tax refunds, the Alabama Supreme Court ruled that the State was immune from suit under § 14 of the Alabama Constitution. The court also ruled that the requirements of the tax refund statutes were jurisdictional, barring Gladwin's suit in any event.

1. The current Commissioner of the Alabama Department of Revenue is respondent Cynthia Underwood. Petitioner Millcraft-SMS Services, L.L.C. is the successor in interest to Gladwin Corporation. This brief will refer to Millcraft as "Gladwin" – the company name used by the courts below. The other petitioner is Arizona Chemical Company.

As noted, Gladwin commenced this action in 1996. While the underlying litigation in *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999), was pending, Gladwin moved for an injunction, requesting that

franchise taxes collected by the Commissioner be held in escrow pending the outcome of *South Central Bell*. In August 1997, the trial court granted Gladwin's request. Pet. App. 69a, 77a. In October 1998, the Alabama Supreme Court reversed the injunction, but did not, as Gladwin now implies, rule that Gladwin's direct class action against the State was permissible. *Compare* Pet. 3, 11-12 *with* Pet. App. 72a.

Rather, the Alabama Supreme Court ruled that Gladwin had failed to show "imminent risk of irreparable injury," because Gladwin had "strenuously argue[d] that it [was] entitled to the full range of retroactive relief, including refunds." Pet. App. 72a. The court did not address whether Gladwin was entitled to bring a direct class action, and it did not imply that Gladwin's action was proper regardless of its procedural defects. In fact, the court was not aware that Gladwin had failed to comply with the TBOR before bringing its suit. Pet. App. 34a n.3. One justice of the Alabama Supreme Court even concurred specially and noted that tax refunds would be available to "those taxpayers that timely filed claims for refunds." Pet. App. 74a.

2. In March 1999, this Court decided *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999), ruling that Alabama's franchise tax scheme violated the Commerce Clause of the United States Constitution. Thereafter the Department of Revenue ceased collection of the former franchise tax, and the Alabama Legislature passed replacement legislation, the Alabama Business Privilege Tax Act of 1999. Ala. Code §§ 40-14A-1 to -43. The business privilege tax is now calculated from the net worth of a corporation without regard to its state of incorporation. *Id.* § 40-14A-22.

On remand from *South Central Bell*, the Alabama Supreme Court held, and the Commissioner agreed, that this Court's decision in *South Central Bell* would be applied retroactively. *South Central Bell Tel. Co. v. State*, 789 So. 2d 147, 148-49 (Ala. 2000). In addition, the Alabama Supreme Court observed that "failure to comply with state procedural requirements can preclude a recovery of taxes paid pursuant to a levy or assessment that violates the United States Constitution." *Id.* at 149 n.7 (citing *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 45 (1990); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 757-58 (1995)). The court remanded the case to the trial court with directions to collect evidence from the parties of, among other things, compliance with the relevant tax refund statutes, to determine what remedy, if any, the taxpayers were entitled to receive. *Id.* (citing former Ala. Code § 40-2-22 for the years 1982-92, and § 40-2A-7 for the years 1992-99). Ultimately, the plaintiffs in *South Central Bell* settled their claims with the Commissioner prior to any ruling by the Alabama Supreme Court on a remedy. Pet. App. 2a.

3. In October 2000, two additional taxpayers joined Gladwin as plaintiffs in the class action. Pet. App. 37a. Both of those taxpayers, petitioner Arizona Chemical Company and Jefferson Smurfit Corporation (U.S.), had filed claims under the TBOR and were pursuing those claims to perfect subject matter jurisdiction at the time they joined Gladwin's class action. Pet. App. 37a, 41a. Gladwin's current counsel were also counsel for Arizona Chemical and Jefferson Smurfit at the time. They advised their clients that it would be "prudent to file administrative claims for refunds." Pet. App. 51a.

In January 2001, petitioners Gladwin and Arizona Chemical filed a Memorandum in Support of Class Certification, seeking a class whose definition included all foreign franchise taxpayers, regardless of whether they had filed administrative claims. Pet. App. 38a. In response, the Commissioner moved to dismiss the case, contending that the court lacked subject matter jurisdiction under the TBOR and that petitioners' claims violated the State's sovereign immunity under § 14 of the Alabama Constitution of 1901. Pet. App. 39a-40a. The trial court acknowledged that petitioners had not invoked jurisdiction under the TBOR – Gladwin because it had not filed administrative claims at all, and Arizona Chemical because it had not completed the administrative process. Pet. App. 41a. The trial court nevertheless exercised jurisdiction over petitioners' claims and denied the Commissioner's motion to dismiss as to Gladwin and Arizona Chemical.[1] Pet. App. 42a.

The trial court cited only two cases in denying the Commissioner's motion to dismiss: *Thorn v. Jefferson County*, 375 So. 2d 780 (Ala. 1979), and *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470 (Ala. Civ. App.), *cert. denied*

[1] In 1998, Jefferson Smurfit appealed to the Circuit Court of Montgomery County, Alabama the denial of its petition for refund under TBOR. That appeal was pending in 2000, when Jefferson Smurfit joined Gladwin's class action. Pet. App. 39a. The Commissioner moved to dismiss Jefferson Smurfit's claims on grounds of lack of subject matter jurisdiction and sovereign immunity. The Commissioner also moved to dismiss under Ala. Code § 6-5-440, which provides that a plaintiff is not entitled to prosecute two simultaneous actions in Alabama courts for the same claims against the same party. The trial court dismissed Jefferson Smurfit's claims under § 6-5-440. Jefferson Smurfit did not appeal the dismissal. Pet. App. 40a.

(Ala. 1999), *and cert. denied,* 120 S. Ct. 1426 (2000). In *Valhalla*, the intermediary court of appeals did not address sovereign immunity but rather based its decision on an ad valorem tax decision by the Alabama Supreme Court. 749 So. 2d at 473. That ad valorem tax decision was irrelevant to the TBOR, because the TBOR excludes ad valorem taxes from its scope. Ala. Code § 40-2A-2(2). In *Thorn*, a class of taxpayers had sought ad valorem tax refunds. *Thorn* also did not involve the TBOR, as petitioners have conceded, Pet. 3, for the obvious reason that the TBOR was enacted in 1992 and *Thorn* was decided in 1979. Even if *Thorn* were decided today, it would not contradict the TBOR, because, again, the TBOR excludes ad valorem taxes from its scope.

In June 2001, the trial court certified a class of taxpayers. The court ruled that taxpayers who had pursued refunds under the TBOR could be represented by petitioner Arizona Chemical. Those taxpayers who had not pursued remedies under the TBOR could be represented by petitioner Gladwin. Pet. App. 44a.

4. In August 2001, the Commissioner filed an interlocutory appeal to the Alabama Supreme Court under Ala. Code § 6-5-642, challenging the trial court's class certification ruling. Pet. App. 3a. The Commissioner's primary contention was that the trial court lacked subject matter jurisdiction over the action. Pet. App. 6a. Prior to oral argument, the Alabama Supreme Court instructed petitioners to address sovereign immunity and the effect of their failure to comply with the TBOR. Pet. 4.

On May 17, 2002, the Alabama Supreme Court ruled that the trial court lacked subject matter jurisdiction over

petitioners' claim. The court ruled that, because petitioners had failed to comply with the TBOR, a direct action for tax refunds against the State violated sovereign immunity. Pet. App. 34a. In addition, because the TBOR is jurisdictional on its face, the court held that non-compliance with the administrative procedures prescribed by the TBOR barred petitioners' claims. Pet. App. 33a.

The court rejected the "bait and switch" argument that petitioners seek to advance to this Court. The court recounted the long history of Alabama cases barring refunds to taxpayers based upon their failure to comply with the administrative processes prescribed in various tax refund statutes. "[N]othing in the refund statutes discussed," the court stated, "or in this Court's caselaw construing those statutes, suggests to the reasonable taxpayer that anything less than strict statutory compliance is sufficient to support a right to a tax refund from the State." Pet. App. 28a. The Alabama Supreme Court found that the holdings and the rationales of all of its decisions from 1939 to the present supported this position. Pet. App. 22a. The court concluded that "[t]he reasonable taxpayer contemplating a forum for franchise-tax refunds had no reason to believe that a direct action against the State was permitted under Alabama law. The TBOR is jurisdictional on its face." Pet. App. 33a (*citing* Ala. Code §§ 40-2A-7(c)(5)c. & -9(g)(1)).

The Alabama Supreme Court distinguished several cases cited by petitioners on the ground that the cases involved ad valorem taxes assessed by counties, which have never enjoyed sovereign immunity under Alabama law. Pet. App. 29a. The court discussed at length the tax refund statutes that had been in effect over the past 67 years, none of which applied to ad valorem taxes. Pet. App.

14a, 15a, 25a-27a. The court also distinguished two decisions of the Alabama Court of Civil Appeals – *Sizemore v. Rinehart*, 611 So. 2d 1064 (Ala. Civ. App. 1992), *writ quashed as improvidently granted*, 611 So. 2d 1069 (Ala. 1993); and *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470 (Ala. Civ. App. 1999) – upon which petitioners now base their "bait and switch" argument. The court dismissed these lower court decisions as aberrant departures from the Alabama Supreme Court's unswerving line of cases requiring strict compliance with tax refund statutes in order to sue the State of Alabama or its officers in state court. Pet. App. 30a-32a. In any event, the Alabama Supreme Court noted that *Monroe* was decided in 1999, and thus could not have led the "reasonable taxpayer" to conclude it could bring a direct suit for tax refunds in 1996, when Gladwin filed its class action. Pet. App. 32a.

Finally, the court rejected petitioners' argument that their direct class action for refunds should be treated as an exception to the State's sovereign immunity doctrine, because the trial court could order the Commissioner in equity to fulfill her "ministerial duty" to issue the requested refunds. Pet. App. 28a. The court ruled that compliance with the TBOR, along with a decision by the Department of Revenue or by a court reviewing a decision of the Department, was necessary to make the Commissioner's duty to issue the refunds "ministerial." Absent compliance with the TBOR, the ministerial act exception to sovereign immunity was not available to petitioners as a matter of Alabama law. Pet. App. 28a-29a.

REASONS FOR DENYING THE PETITION

The decision below rests on independent and adequate state law grounds. Petitioners' facile attempt to divine a federal issue from this case should be rejected, along with their petition for a writ of certiorari. Alabama has provided petitioners an administrative remedy for their franchise tax refund claim. The Supreme Court of Alabama has not wavered in holding that strict compliance with the administrative process prescribed by a tax refund statute is necessary for a taxpayer to obtain a refund from the State. It is the fault of petitioners, not of the State, that they failed to comply with the administrative process prescribed by Alabama's tax refund statute.

Petitioners' contention that the State tricked them into bringing this class action, instead of seeking the proper administrative remedy, is fatuous nonsense. Two aberrant and distinguishable decisions by an intermediate court of appeals would not have induced the reasonable taxpayer to ignore the clear language of Alabama's tax refund statute or the unbroken line of the authority in the Alabama Supreme Court requiring strict compliance with that statute. If 2,500 taxpayers since the enactment of Alabama's Taxpayers' Bill of Rights in 1992 have been able correctly to ascertain that the TBOR and not an original action is the remedy for their refund claims, parties represented by counsel of the stature of petitioners' counsel should have been able to do the same.

Indeed, petitioner Arizona Chemical is one of the 2,500 foreign corporations that have requested franchise tax refunds through proper administrative channels in the wake of *South Central Bell*. Those claims are moving through the administrative process, and many refunds

have already been paid. Petitioners seek reversal of the Alabama Supreme Court's decision in this case, not because it prevents them from obtaining their refunds, but because it prevents them from bringing a *direct class action* to obtain their refunds. This is not an issue worthy of certioriari, let alone a federal issue that comes within the jurisdiction of this Court.

I. The Decision Below Rests on Independent and Adequate State Law Grounds and Is Therefore Barred From Review by This Court.

Section 14 of the Alabama Constitution of 1901 provides:

> That the State of Alabama shall never be a defendant in any court of law or equity.

From 1943 to 1992, Alabama courts did not allow taxpayers to obtain a tax refund from the State unless they followed the administrative procedures prescribed by statute and paid their taxes under protest. Pet. App. 15a-22a. The Alabama Supreme Court has long held that these procedures provided the only method for taxpayers to seek refunds without violating Alabama's sovereign immunity. Pet. App. 17a-22a (*citing Glass v. Prudential Ins. Co.*, 22 So. 2d 13 (1945)).

In 1992, four years before Gladwin commenced this action, the Alabama Legislature enacted the Taxpayer's Bill of Rights and Uniform Procedures Act ("the TBOR"), Ala. Code §§ 40-2A-1 to -15, 40-2A-7(c)(5)c. & -9(g)(1). The TBOR repealed the payment-under-protest provisions that had been in place since 1943. The purpose of the TBOR was to "provide equitable and uniform procedures for the

operation of the [Alabama Department of Revenue] and for all taxpayers when dealing with the department." Ala. Code § 40-2A-2 (*quoted in* Pet. App. 13a n.2).

The TBOR allows a taxpayer up to three years to file a petition for refund of taxes paid to the State. Ala. Code § 40-2A-7(c)(2). If its petition is denied, the taxpayer then has two more years to appeal the denial either to the Administrative Law Division of the Alabama Department of Revenue or to an Alabama circuit court. Ala. Code § 40-2A-7(c)(5)a. & b. If the taxpayer chooses to appeal to the Administrative Law Division and is dissatisfied with the result, it may then appeal within 30 days to an Alabama circuit court. Ala. Code § 40-2A-9(g)(1). If the case reaches the circuit court other than by timely appeal, then the refund claim must be dismissed for lack of jurisdiction. Ala. Code § 40-2A-7(c)(5)c. & -9(g)(1).

The Alabama Supreme Court based its ruling in this case on petitioner's failure to comply with the TBOR and on the unbroken line of authority in the Alabama Supreme Court holding that a taxpayer must comply with the administrative procedures prescribed by statute before it may obtain a refund from the State. Failure to comply with state procedure is an independent and adequate ground of decision barring review by this Court, so long as the State has a legitimate interest in enforcing its procedural rule. *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978) (*citing Henry v. Mississippi*, 379 U.S. 443, 447 (1965); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.*, 360 U.S. 334, 342 n.7 (1959); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969)). This Court is particularly deferential to the decision by a state court of last resort that the state court does not have subject matter jurisdiction over the case under state law. *Palmer v. Ohio*, 248

U.S. 32, 33 (1918); *Callan v. Bransford*, 139 U.S. 197, 198 (1891); *Smith v. Adsit*, 83 U.S. (16 Wall.) 185, 188 (1873); *Semple v. Hagar*, 71 U.S. (4 Wall.) 431, 434-35 (1867); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 530 (1858); *President & Dirs. of the Bank of Washington v. Arkansas*, 61 U.S. (20 How.) 530, 532 (1858); R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 115 (7th ed. 1993).

Alabama has a legitimate interest in requiring taxpayers to comply with the procedural requirements of its tax refund statutes. In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), this Court recognized a State's concern that its "obligation to provide refunds for what later turns out to be an unconstitutional tax would undermine the State's ability to engage in sound fiscal planning." *Id.* at 44. The Court further elaborated:

> A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; . . . [or] enforce relatively short statutes of limitations applicable to such actions. . . .

Id. at 45 (citing *Ward v. Love County Board of Comm'rs*, 253 U.S. 17, 25 (1920)).

This is not a case in which the state court referred to but did not rely upon a procedural bar as an independent ground for its decision. *Compare, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). In *Caldwell*, this Court found that the state court had not relied upon a procedural bar in reaching its decision. Nevertheless, this Court

acknowledged: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 327 (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)). Here, the Alabama Supreme Court did not base its decision alternatively on state grounds; it based it exclusively on state grounds.

Neither is this a case in which the state court based its decision on a procedural rule that was not firmly established and strictly and regularly followed. *Compare James v. Kentucky*, 466 U.S. 341, 343 (1984); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). Nor is this a case in which the state court invoked a novel rule, the existence of which Petitioners could not have been "deemed to have been apprised." *Compare NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 457-58 (1958); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679 (1930).

Instead, the Alabama Supreme Court followed the plain language of the TBOR, an Alabama statute enacted four years before this action was filed, and 63 years of its own precedent holding that taxpayers must follow administrative procedures prescribed by statute before obtaining tax refunds from the State. Nothing "suggests to the reasonable taxpayer that anything less than *strict statutory compliance* is sufficient," and the reasonable taxpayer "had no reason to believe that a direct action against the State was permitted," because "[t]he TBOR is *jurisdictional on its face*." Pet. App. 28a, 33a (citing Ala. Code §§ 40-2A-7(c)(5)c. & -9(g)(1)) (emphasis in original).

Even when a state's highest court overrules its own precedent in construing a statute, which the Alabama Supreme Court did not do here, there is no due process

violation unless a party is deprived of an opportunity to have its federal challenge to a state law heard. For instance, in *Brinkerhoff-Faris*, this Court stated, "Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule [precedent]. Neither of these matters raises a federal question; neither is subject to review." 281 U.S. at 681. In this case, petitioners have not been deprived of an opportunity to make a constitutional challenge to a tax. That challenge has been made already, and sustained, in *South Central Bell*. Petitioners have had ample opportunity to request refunds under *South Central Bell* through the processes set forth in the TBOR. Indeed, petitioner Arizona Chemical has made such a request.

The only precedents that the Alabama Supreme Court overruled in this case were two aberrant decisions by the Alabama Court of Civil Appeals, an intermediate appellate court. Pet. App. 32a-33a. The overruling was no surprise, given previous decisions of the Alabama Supreme Court requiring compliance with the procedures in the tax refund statutes before getting a refund. Even if Alabama's highest court had never considered whether a direct action for tax refunds was permissible under Alabama law, petitioners could not claim injury based on their reliance on decisions of an intermediate court.

> Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own. Likewise, if the administrative remedy [is] still available to the plaintiff, there would be no denial of due process in that regard.

Brinkerhoff-Faris, 281 U.S. at 681 n.9.

Fundamental to our system of federalism is the proposition that "[n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (*citing New York v. Ferber*, 458 U.S. 747, 767 (1982); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 226 n.9 (1980); *Wardius v. Oregon*, 412 U.S. 470, 477 (1973); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967)). In the case at hand, the highest court of Alabama interpreted an Alabama statute to prohibit an Alabama court from taking subject matter jurisdiction over petitioners' franchise tax refund claims. Indeed, the court held that the statute was "jurisdictional on its face." Pet. App. 33a (citing Ala. Code § 40-2A-7(c)(5)c. & -9(g)(1)). "When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, [this Court] must act with utmost caution before deciding that it is obligated to entertain the claim." *Johnson*, 520 U.S. at 919 (*citing Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950); *Georgia Rail Road & Banking Co. v. Musgrove*, 335 U.S. 900 (1949) (per curiam); *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929)). Because the decision below was based on independent and adequate state law grounds, this Court should decline to review it.

II. Petitioners' "Bait and Switch" Argument Is a Specious Attempt to Create a Federal Issue Where None Exists and Does Not Merit Review By This Court.

Petitioners attempt to manufacture a federal issue by arguing that a reasonable taxpayer had no way of knowing that Alabama's highest court would require it to comply with the TBOR to obtain a refund from the State. Relying on *Reich v. Collins*, 513 U.S. 106 (1994) and *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. 442 (1998), petitioners claim that they have been the victims of a judicial "bait and switch" and thus have been denied due process. Pet. 7. This claim is disingenuous at best. The language of the TBOR is clear, and the precedents of the Alabama Supreme Court requiring compliance with administrative procedures before obtaining a tax refund are consistent and long-established. No "reasonable taxpayer" under *Reich* and *Newsweek* would have read the aberrant decisions of the Court of Civil Appeals to obviate compliance with the administrative procedures set forth in the TBOR.

In arguing that they typify the "reasonable taxpayer" under *Reich* and *Newsweek*, petitioners omit several salient facts. First, approximately 2,500 foreign corporations have read the law correctly and have requested franchise tax refunds from the Alabama Department of Revenue through the administrative processes prescribed in the TBOR. Many of these corporations, including the plaintiffs in *South Central Bell*, have already received their refunds. Second, petitioner Arizona Chemical itself has filed a request for a refund under the TBOR. Third, petitioners' counsel advised their foreign corporation clients that they should comply with the TBOR when

seeking a franchise tax refund. Fourth, Gladwin is the only foreign corporation that has requested a franchise tax refund by filing a direct action (a class action) in an Alabama court and not by filing an administrative claim with the Department of Revenue. Pet. App. 33a, 51a, 63a.

In short, petitioners are not the victims they portray themselves to be. They have played the system as long as it has let them, and they have lost. This Court should not allow them to play it any longer.

A. Alabama law made clear that petitioners had to comply with the administrative process prescribed by statute to obtain tax refunds from the State.

As petitioners admit, "the relevant inquiry [under *Reich* and *Newsweek*] is what the 'reasonable' or 'average' taxpayer would have believed was required to obtain a refund." Pet. 6. Petitioners' feigned ignorance of Alabama law is anything but reasonable. "[N]othing in the refund statutes discussed above, or in [the Alabama Supreme] Court's caselaw construing those statutes, suggests to the reasonable taxpayer that anything less than strict statutory compliance is sufficient to support a right to a tax refund from the State. Pet. App. 28a. "The reasonable taxpayer contemplating a forum for franchise-tax refunds had no reason to believe that a direct action against the State was permitted under Alabama law. The TBOR is jurisdictional on its face." Pet. App. 33a (citing Ala. Code §§ 40-2A-7(c)(5)c. & -9(g)(1)).

Much of petitioners' "bait and switch" argument is based on Alabama case law allowing suits for refunds of ad

valorem taxes against counties, which do not enjoy sovereign immunity from suit. The TBOR itself distinguishes ad valorem taxes: "[N]othing herein shall be construed to apply to the assessment of ad valorem taxes on real or personal property which is administered by the various counties of the State of Alabama. . . . " Ala. Code § 40-2A-2(2). Petitioners nevertheless argue that the Commissioner of Revenue was a defendant in three of the ad valorem cases they cite. Pet. 8 (citing *Eagerton v. Williams*, 433 So. 2d 436 (Ala. 1983); *White v. Sims*, 470 So. 2d 1191 (Ala. 1985); *Mingledorff v. Vaughn Regional Medical Center, Inc.*, 682 So. 2d 415 (Ala. 1996)). Petitioners neglect to disclose that, while the taxpayers in these cases were challenging regulations issued by the Commissioner, they were requesting refunds of taxes paid to various counties. In none of these cases was a taxpayer making a refund claim against the Commissioner herself.

Petitioners also rely on three obviously mistaken decisions by the Alabama Court of Civil Appeals, in which the court permitted a taxpayer to sue the State without first complying with statutory procedures. *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470 (Ala. Civ. App. 1999); *Sizemore v. Owner-Operator Indep. Drivers Ass'n, Inc.*, 671 So. 2d 674, 677 (Ala. Civ. App. 1995), *and cert. denied* (Ala. Nov. 9, 1995), *and cert. denied sub nom. Eagerton v. Owner-Operator Indep. Drivers Ass'n, Inc.*, 517 U.S. 1121 (1996); *Sizemore v. Rinehart*, 611 So. 2d 1064 (Ala. Civ. App. 1992), *writ quashed as improvidently granted*, 611 So. 2d 1069 (Ala. 1993). One of these cases was decided before the TBOR and is therefore superseded.

Another was decided after petitioners filed this lawsuit. All are contrary to the vast weight of authority in the Court of Civil Appeals.[2] More importantly, they are contrary to the unanimous authority of the Alabama Constitution and the Alabama Supreme Court. Ala. Const. § 14; *Glass v. Prudential Ins. Co. of America*, 22 So. 2d 13, 15-18 (1945), *superseded by statute on other grounds as recognized by Mooney v. Weaver*, 79 So. 2d 3 (1955); *J.R. Raible Co. v. State Tax Comm'n*, 194 So. 560, 561 (Ala. 1939). No reasonable taxpayer would have relied on these decisions by an intermediate court of appeals in the face of such conflicting and superior authority. *Brinkerhoff*, 281 U.S. at 681 n.9.

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[2] *State v. Garner*, 812 So. 2d 380, 383-84 (Ala. Civ. App. 2001) (holding that taxpayer's failure to comply strictly with TBOR prevented court from taking jurisdiction over claims); *State v. Adams*, 798 So. 2d 682, 684 (Ala. Civ. App. 2001) (same); *State v. Medical Care Equip., Inc.*, 737 So. 2d 471, 473 (Ala. Civ. App. 1999) (same);. *State v. Zegarelli*, 676 So. 2d 354, 355 (1996) (same); *State v. Wilcox*, 639 So. 2d 1374, 1374 (Ala. Civ. App. 1994) (same); *Cf. Tindle v. State Farm General Ins. Co.*, 2001 WL 564284, at *4 (Ala. Civ. App. May 25, 2001) (recognizing that TBOR requires administrative review in Department of Revenue before proceeding to circuit court); *State v. Sonat, Inc.*, 690 So. 2d 412, 413 (Ala. Civ. App. 1997) (stating that taxpayer had "paid the disputed franchise tax and timely filed its notice of appeal and complaint, thereby complying with the provisions of [TBOR]"); *State v. Taft Coal Sales & Assocs., Inc.*, 801 So. 2d 838, 839 (Ala. Civ. App. 2001) (noting that taxpayer had complied with TBOR by appealing denial of its petition for refund to Administrative Law Division of Department Revenue, then appealing Law Division's adverse decision to Alabama circuit court); *State v. Union Oil Co.*, 686 So. 2d 284, 285 (Ala. Civ. App. 1996) (same); *State v. Kennington*, 679 So. 2d 1059, 1059-60 (Ala. Civ. App. 1995) (same).

B. Petitioners' refund claims do not meet the "ministerial act" exception to the State's sovereign immunity from suit.

Petitioners attempt to distinguish the authority above by arguing that their case fits the exception from sovereign immunity for actions that seek to "compel the performance of ministerial acts." Pet. 9. They contend that "calculating a refund of illegally collected taxes is a ministerial act." Pet. 9. Petitioners act as if the decision below was inconsistent and confusing to them by claiming that the Alabama Supreme Court has ruled on the one hand that calculating tax refunds is ministerial if the taxpayer follows the TBOR and on the other hand that it is not ministerial if the taxpayer files a direct action for a refund. Pet. 10.

First of all, whether petitioners' case meets the "ministerial act" exception to Alabama's sovereign immunity from suit is a pure question of state law barred from review by this Court. Even if it were not, petitioners have misrepresented the holding of the Alabama Supreme Court. What the court held was that "refunding taxes paid through a mistake or error is – in some contexts – a ministerial act, but it is so only because the statutes make it so." Pet. App. 29a. When the taxpayer follows the administrative process prescribed by the refund statute – such that a court can take jurisdiction over and consider a taxpayer's refund claim, and the court can then determine whether the taxpayer is owed a refund and, if so, how much – the payment of the refund is a ministerial act. "It is ministerial because of the specificity with which the Legislature defined the duties of the taxing officials." *Id.*

Under the TBOR, the duty of the Commissioner of the Department of Revenue is to pay a refund only after the

Administrative Law Division of the Alabama Department of Revenue, the Department itself, or a reviewing court has determined that the taxpayer is entitled to a refund. Ala. Code § 40-2A-7(c)(4) ("If a petition is granted, or the department, the Administrative Law Division, or a court otherwise determines that a refund is due, the overpayment shall be refunded to the taxpayer by the state. . . . "). *See*, e.g., *Sparks v. Louisville & Nashville R.R. Co.*, 166 So. 2d 865, 866 (Ala. 1964) (applying "ministerial act" exception when taxpayer had first "filed with the Alabama State Department of Revenue, pursuant to [former Ala. Code § 40-1-34], a petition for refund"). Because petitioners chose to file a direct action against the State, they have not established their right to a refund such that payment of the refund would be a "ministerial act."

C. The Alabama courts have never recognized an exception to the State's sovereign immunity when a taxpayer claims that a tax is "void or illegal" and seeks a refund.

Petitioners next claim that the Alabama Supreme Court overruled more than "45 years of Alabama precedent on which Petitioners relied to bring this suit." Pet. 6. Petitioners claim that the Alabama Supreme Court has previously allowed taxpayers to bring direct actions for refunds when the tax is challenged as "void or illegal." Pet. 7 (citing *Graves v. McDonough*, 88 So. 2d 371, 373 (Ala. 1956)). By implication, at least, petitioners presume that this Court's decision in *South Central Bell* rendered Alabama's former franchise tax on foreign corporations "void or illegal." The Alabama Supreme Court has never recognized the exception to sovereign immunity that

petitioners hypothesize, and *South Central Bell* did not render Alabama's franchise tax "void or illegal" in any event.

1. As long ago as *Glass v. Prudential Ins. Co.*, 22 So. 2d 13 (Ala. 1945), the Alabama Supreme Court held that a taxpayer challenging the legality of a tax still had to comply with the administrative processes prescribed by the applicable tax refund statute in order to make that challenge. In *Glass*, a foreign insurance company, Prudential, filed a declaratory judgment action against the Alabama Superintendent of Insurance, challenging the constitutionality of Alabama's business license tax on the basis that it discriminated in favor of domestic insurance companies. 22 So. 2d at 14. Prudential filed its action on February 26, 1945, and at the same time sought an injunction to prevent the revocation of its business license for its failure to pay the tax, which was to become delinquent in just a few days (60 days after December 31, 1944). *Id.* at 14-15. The Alabama Supreme Court noted that Prudential could have brought the declaratory judgment action against the Superintendent if it had not waited until the eve of delinquency to file it. *Id.* at 15; *accord Curry v. Woodstock Slag Corp.*, 6 So. 2d 479 (Ala. 1942) (permitting action against Commissioner of Revenue seeking only a declaratory judgment that plaintiff did not have to pay sales tax). Because Prudential had waited so long, however, the court ruled that Prudential first had to pay the tax to prevent revocation of its license, so long as Prudential had a legal remedy through which it could later obtain a refund if it prevailed on the merits of its constitutional challenge. 22 So. 2d at 15 (citing *State v. Inman*, 191 So. 224 (1939)). The court ruled that Prudential had such a remedy, in the form of the payment-under-protest statute

discussed above that permitted a taxpayer to appeal to a court if a state official wrongly denied its refund request. 22 So. 2d at 15-16.

In short, the Alabama Supreme Court acknowledged that a taxpayer could request that a court consider its request for a refund, but only after the taxpayer had complied with the procedure prescribed by the applicable tax refund statute. The court did not rule that the taxpayer could bring a direct action against the State to obtain a refund. The court required the taxpayer to comply with the administrative procedure even when the taxpayer contended that the tax was unconstitutional and thus "void or illegal."

2. Petitioners incorrectly presume, moreover, that the taxes at issue here are "void or illegal." In *South Central Bell*, this Court concluded that the Alabama franchise tax regime as a whole, not the foreign franchise tax standing alone, was unconstitutionally discriminatory. 526 U.S. at 169. As this Court noted in *McKesson Corp. v. Division of Alcohol Beverages & Tobacco*, 496 U.S. 18 (1990), there is an important difference between taxes that are discriminatory and those that are "void or illegal." In addressing the effect of the decision of the Florida courts that had held the tax at issue to be unconstitutionally discriminatory, this Court explained:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose, as was the unapportioned tax in *O'Connor*, or because the taxpayers were absolutely immune from the tax, as were the Indian Tribes in *Ward* and *Carpenter*, no corrective action by the State could cure the invalidity of the

> tax during the contested tax period. The State would have had no choice but to 'undo' the unlawful deprivations by refunding the tax previously paid under duress, because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment."
>
> Here, however, the Florida courts did not invalidate the Liquor Tax in its entirety; rather, they declared the tax scheme unconstitutional only insofar as it operated in a manner that discriminated against interstate commerce.

McKesson, 496 U.S. at 39 (citations omitted).

In a bizarre twist, petitioners claim that the decision below, in recognizing that taxpayers may get refunds from the State through the TBOR, itself violates sovereign immunity. Pet. 10-11. What taxpayers would gain from this Court's agreement with petitioners' argument is anything but clear, but it is incorrect in any event. The Alabama Legislature is free to enact laws establishing the jurisdiction of Alabama's courts. The TBOR simply codified years of Alabama sovereign immunity jurisprudence that made compliance with procedural tax statutes jurisdictional. The Alabama Supreme Court has held, moreover, that a taxpayer's appeal from the Department of Revenue to an Alabama court does not constitute an action in which the State is made a "defendant in any court," as prohibited by § 14 of the Alabama Constitution. *State v. Louis Pizitz Dry Goods Co.*, 11 So. 2d 342, 346 (Ala. 1943); *accord Metcalf v. Department of Indus. Relations*, 16 So. 2d 787, 790 (Ala. 1944) ("These proceedings are in effect only an appeal from the order of the Department of Industrial

Relations. . . . This is not forbidden by § 14 of the Constitution").

Petitioners did not challenge the constitutionality of the TBOR below. It is worthy of note, however, that petitioners now insist that the State's immunity is absolute and that the law of Alabama regarding sovereign immunity has been clear for 126 years. Pet. 10-11. With this, the Commissioner cannot argue.

D. The Alabama Supreme Court did not previously hold in this case that petitioners had a remedy in the form of a direct class action for tax refunds.

Petitioners assert, finally, that the Alabama Supreme Court stated in a previous decision in this litigation that Gladwin's direct class action was an available method to obtain a tax refund. Pet. 5, 11-12. In a sophistical attempt to transform their own argument into the holding of the Alabama Supreme Court, petitioners state:

> The Alabama Supreme Court's holding that Petitioners cannot sue directly for a refund is all the more surprising, considering that the same court, three-and-a-half years earlier in this case, held that Petitioners were not entitled to equitable relief from the State because they had an adequate remedy at law, namely, "the full range of retroactive relief, including refunds" required by this Court's decisions in *Newsweek*, *Reich*, and *McKesson*.

Pet. 11-12 (citing Pet. App. 72a).

The issue in the earlier case before the Alabama Supreme Court was whether Gladwin was entitled to a

preliminary injunction requiring their franchise tax payments to be held in escrow pending the decision whether Alabama's franchise tax was constitutional. The first showing that Gladwin had to make to obtain the preliminary injunction was that "without the injunction the plaintiff would suffer immediate and irreparable injury." Pet. App. 70a. The court found that "Gladwin's forceful arguments" of its entitlement to refunds prevented it from meeting the first necessary element. Pet. App. 72a. The court explained Gladwin's arguments and its holding as follows:

> In the section of its brief to this Court headed "Point III," Gladwin argues that if the statute is determined to be unconstitutional, the state may be required to provide "'meaningful backward-looking relief to rectify any unconstitutional deprivation,'" namely, "refunds." (Brief of Appellee [Gladwin] at pp. 19-20) (*quoting McKesson*, [496 U.S. at 39].) . . . As further support for this proposition, Gladwin cites other decisions from the United States Supreme Court, including *Newsweek, Inc. v. Florida Department of Revenue*, [522 U.S. 442] (1998); *Reich v. Collins*, 513 U.S. 106 (1994); and *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993).
>
> Gladwin's forceful arguments betray its contention that without the injunction it "face[s] an imminent risk of irreparable injury" if § 40-14-1 is ultimately held to be unconstitutional. In other words, Gladwin strenuously argues that it is entitled to the full range of retroactive relief, including refunds, if it prevails on the merits. Because it has thus failed to meet its burden of demonstrating to this Court that the elements necessary to support the injunction are satisfied,

> the order of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Pet. App. 71a-72a. The court did not hold, as petitioners now suggest, Pet. 11-12, that petitioners had the full arsenal of legal remedies available to them, including a direct class action against the State. Rather, the court stated that Gladwin had made a convincing argument that it would have available some sort of retroactive relief and thus had failed to meet its burden of showing irreparable injury. The court said nothing about whether a direct class action, as opposed to an administrative claim, was the appropriate means for petitioners to obtain the refunds they might later seek.

E. The 2,500 foreign corporations that have sought refunds through the administrative process prescribed by Alabama statute are the true measure of the "reasonable taxpayer."

In touting themselves as the "reasonable" or "average" taxpayers, petitioners fail to acknowledge several facts. First, approximately 2,500 foreign corporations have requested franchise tax refunds through the TBOR. These claims have either been settled or are currently pending in Alabama courts or in the Department of Revenue. Pet. App. 2a, 33a, 63a.

Second, one of the 2,500 taxpayers that recognized the necessity of complying with the TBOR was petitioner Arizona Chemical. Before joining Gladwin in this class action, Arizona Chemical filed an individual refund claim with the Administrative Law Division of the Department

of Revenue. The Alabama Supreme Court thus noted: "For all that appears, [Arizona Chemical] may still prosecute its individual claim for refunds in the proceeding it commenced under the TBOR before it joined this action." Pet. App. 33a.

Third, petitioners' counsel recognized the risk that the State's highest court would require compliance with the TBOR in franchise tax refund cases. They advised their foreign corporation clients seeking franchise tax refunds that "it would be prudent to file administrative petitions for refunds. . . . " Pet. App. 51a. Those taxpayers that took counsel's advice and complied with the TBOR will have their refund claims heard.

Fourth, Gladwin was the only taxpayer out of 2,500 foreign corporations that requested franchise tax refunds in Alabama solely by filing a direct action against the State (a class action), instead of pursuing its claims first through the TBOR. Gladwin had numerous judicial warnings and opportunities to make its refund claims under the TBOR but failed to do so. The TBOR does not provide a procedure for a class action, and Gladwin risked its relatively small individual claim for the chance that it would recover $1 billion for all taxpayers' claims in a direct class action.

In sum, Gladwin "assume[d] the risk that the ultimate interpretation by the highest court might differ from its own." *Brinkerhoff*, 281 U.S. at 681 n.9. Gladwin made its bed. Now it must lie in it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

MILLCRAFT-SMS SERVICES, L.L.C. and
ARIZONA CHEMICAL COMPANY,
Petitioners,

v.

CYNTHIA UNDERWOOD, in her official capacity as
Commissioner of the State of Alabama
Department of Revenue,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF *AMICUS CURIAE* [1] COUNCIL ON STATE TAXATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SUMMARY OF THE ISSUE

A state's refusal to timely fix an unconstitutional tax and its subsequent failure to provide the constitutionally

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consents for the filing of this brief have been obtained from the Petitioner and Respondent and filed with the Clerk of the Court.

mandated remedies to its aggrieved taxpayers serves neither the individual taxpayers involved nor the greater populace to which the state is ultimately responsible. Once a mistake has been made, a state needs to fix it promptly and not allow it to fester and spread. Alabama failed to fix its mistake and now fails to remedy the mistake it made.

The history of this case could be classified as a "comedy of errors" if not for the fact that the results are painfully serious. Alabama imposed an unconstitutional franchise tax on out-of-state corporations for decades. Ala. Code 1975 §§ 40-14-40, and –4, repealed by Act No. 665, 1999 Ala. Acts 131, Second Special Session. The Alabama Supreme Court let this tax stand, not once, but twice. *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied, Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999) (overruling Alabama Supreme Court upholding constitutionality of Alabama foreign franchise tax). When this Court finally reviewed the tax, after denying review in Alabama's first decision upholding the tax, the tax was struck down 9-0. *South Central Bell*, 526 U.S. 160. Alabama knew the problems with its tax and never even argued to this Court that its tax was constitutional! Alabama continued to collect the tax long after it recognized its inconstitutionality and denied the taxpayers' request to hold the contested funds in escrow by promising that all of the taxpayers' remedies at law would remain available. Now, after having lost on the constitutionality, Alabama claims for the first time that a 45 year precedent relied upon by Alabama taxpayers and lower courts is not the appropriate procedure for taxpayers to obtain a remedy for the illegally collected tax. Alabama, after having already reaped the rewards of this Court's decision not to review the tax the first time around, now continues to avoid the consequences by imposing unconstitutional procedural blockades to relief. COST hopes that this Court will not let Alabama get away with this.

INTEREST OF THE *AMICUS CURIAE*

The Council On State Taxation (COST) submits this brief as *amicus curiae* in support of Petitioners in the above captioned matter. COST is a non-profit trade association organized in 1969 as an advisory committee to the Council of State Chambers of Commerce.[2] COST, which was separately incorporated on January 1, 1992, has a membership of over 540 multistate corporations involved in interstate and international commerce. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of its members and all multi-jurisdictional business entities.

The present case involves Alabama's retroactive withdrawal of a previously available procedural remedy for taxpayers seeking refunds of a franchise tax declared unconstitutional by this Court. Alabama's former franchise tax[3] was imposed on a different base for out-of-state taxpayers than for in-state taxpayers. The result was that out-of-state taxpayers frequently bore a heavier tax burden than they would have if they had been incorporated in Alabama. In 1999, this Court determined that Alabama's franchise tax was unconstitutional. *South Central Bell*, 526 U.S. 160.[4]

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[2] COST was previously the Committee On State Taxation but changed its name to the Council On State Taxation by vote of its membership November 6, 2001.

[3] In 1999 the Alabama legislature repealed the unconstitutional tax and adopted a new business privilege tax on all corporations doing business in the State. Act No. 665, 1999 Ala. Acts 131, Second Special Session.

[4] *South Central Bell* is the predecessor to the case at issue here. The taxpayers in *South Central Bell* settled their claims individually with the state following this Court's ruling and their case was dismissed. This case then took the lead regarding the establishment of the remedy for the unconstitutional tax.

Three later,[5] the State continues to add insult to injury by refusing to review Petitioners' claims for a remedy. This case raises the issue of what is the constitutional standard by which states are judged in providing procedural remedies for their discriminatory tax schemes and as such is at the core of COST's mission.

Many of COST's members are engaged in business in the State of Alabama and many have paid the unconstitutional franchise tax. Thus, these members have a particular interest in the remedial landscape in the State. Further, all of COST's members are subject to a variety of potentially invalid state taxes. These members have a continuing interest in the availability of clear and certain procedural and substantive remedies to such illegal taxes. COST and its members have seen first hand the financial loss and confusion that results when taxpayers are denied their constitutional remedies for an invalid tax. As a result of this continuing interest in the problems of remedies for invalid taxes, COST has performed in-depth studies of the law of state tax remedies and continues to monitor the problem. In furtherance of this study and monitoring, COST has filed *amicus curiae* briefs with this Court in numerous other cases concerning the scope of the Due Process Clause requirements related to remedying unconstitutionally collected taxes. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990); *Newsweek, Inc. v. Department of Rev. of the State of Florida*, 522 U.S. 442 (1998); *Sharper Image. v. Department of Revenue*, 704 So. 2d 657 (Fla. Dist. Ct. App. 1997), *cert. denied*, 526 U.S. 1016 (1999); and *Milwaukee Safeguard Ins.*

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[5] One of the many truly galling things about this case is that the State basically agreed that its franchise tax was unconstitutional before even arguing its case to this Court by failing to present any argument supporting its constitutionality. In its argument in *South Central Bell*, like in the case *sub judice*, the State tried to hide behind sovereign immunity to shield it from its constitutionally mandated obligations.

Co. v. Selcke, 754 N.E.2d 349 (Ill. App. 2001), *cert. denied*, U.S., No. 01-1311, (2002). In fact this Court endorsed the "bait and switch" language first proposed by COST in its amicus brief in *Reich v. Collins*. Today, COST and its members remain concerned about the states' continuing reluctance, as evidenced by the Alabama Supreme Court's opinion in this case, to provide remedies that comport with Due Process. Therefore, COST and all of its members have an interest in this case and their knowledge can add to the discussion of the issue.

REASONS FOR GRANTING THE PETITION

A. Alabama's Retroactive Withdrawal Of A Procedural Remedy For An Illegally Collected Tax Violates The Due Process Clause.

This Court is asked once again to overturn a state court's decision to ignore Due Process requirements for remedies associated with illegally collected state taxes. As in the past, a state is attempting to avoid the consequences of imposing an unconstitutional tax by retroactively limiting the procedural remedies available to injured taxpayers seeking recovery of the taxes paid. This Court has specifically forbidden such "bait and switch" tactics in *Reich v. Collins*, 513 U.S. 106 (1994) and applied the prohibition again in a summary reversal in *Newsweek*, 522 U.S. 442. Thus, this Court has shown a strong predilection for limiting states' disobedience in this area.

Notwithstanding this Court's explicit, recent, and repeated prohibition on retroactively changing the available procedural remedies with the effect of denying a taxpayer meaningful backward looking relief for an unconstitutionally collected tax, the Alabama court in this case managed to conclude that *Reich* does not apply here because a "reasonable taxpayer would have thought that [the administrative remedies] represented . . . the exclusive remedy for unlawful franchise

taxes." *Patterson v. Gladwin Corp., et al.*, AL Sup. Ct., No. 1001747 (5/17/02) (emphasis in original)(quoting *Reich v. Collins*). The implausibility of this analysis is evidenced by the fact that *two* Alabama appellate courts had held previously that the procedural remedy chosen by the Petitioners *is* available. *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470, 473 (Ala. Civ. App. 1999), *cert. denied*, (Ala. Nov. 5, 1999), *and cert. denied*, 529 U.S. 1022 (2000); *Sizermore v. Rinehart*, 611 So. 2d 1064, 1067-68 (Ala. Civ. App. 1992), *writ quashed as improvidently granted*, 611 So. 2d 1069 (Ala. 1993). Thus, it is not just the Petitioners or their advisors or all of the taxpayers over the past 45 years that have used the procedure, now retroactively withdrawn by the Alabama Supreme Court, who thought the procedural remedy rejected by the Alabama Court was available. The judges of Alabama's intermediate appellate court system came to the same conclusion. Unable to distinguish these appellate court cases, the Alabama Supreme Court resorted to overruling them. By doing so, the Alabama Supreme Court basically held that the judges on those courts did not represent "reasonable taxpayers". The folly of such a conclusion is strong evidence that the Alabama Supreme Court reached its result first—no refunds—and then sought a theory by which to accomplish the result—procedural path chosen by Petitioners invalid. COST requests this Court not to allow this growing practice.

B. Aggrieved State Taxpayers Face Limited Forums For Challenging Parochial State Court Decisions.

This Court's continued vigilance in assuring an unequivocal definition of the requirements of a constitutional remedy for an unconstitutional tax and mandating that the states provide this relief is also necessary because of the limited forums available to taxpayers to pursue the available remedies. A taxpayer generally cannot challenge the constitutionality of a state or local tax in the lower federal courts.

U.S. Const. Amend. XI; 28 U.S.C. § 1341. The Eleventh Amendment [6] prohibits suits for monetary damages against a state in federal court and thus prevents all suits for state tax refunds. *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 462 (1945). The Tax Injunction Act, as interpreted, prohibits taxpayers from bringing any action in federal court if there is a "plain, speedy, or efficient" remedy at state law. *Newsweek*, 522 U.S. at 444. Most of the cases interpreting the Tax Injunction Act have determined that state refund or protest systems are plain, speedy, and efficient and thus jurisdiction in the federal courts is generally prohibited. *See, e.g., id.; California v. Grace Brethren Church*, 457 U.S. 393 (1982). While this Court has accepted several state tax remedy cases in the past, review by this Court is anything but guaranteed. Thus, taxpayers are usually limited to a state court as the final arbiter of what is an adequate remedy. In order to remind state courts what constitutes a constitutionally sufficient remedy and that their compliance with this rule is being monitored, COST respectfully requests this Court to accept this case for review.

C. Fairness: The States' Continued Failure To Provide Constitutionally Adequate Remedies Results In a Real Loss of Money and Time by Taxpayers.

Finally, we note why this case has captured the attention of the state tax community. It is not surprising to state that the issue of remedies for unconstitutional taxes is one of the most important issues [7] in state and local tax today. Time and again over the past several years, taxpayers have been denied a constitutional remedy by state courts. This is real money

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[6] "The Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by citizens of another state . . . ." U.S. amend. XI.

[7] The other pressing issues being nexus concerns and discriminatory taxes.

being lost by real taxpayers. With the loss of this money, a certain amount of faith in the system is also lost. Taxpayers' only recourse is to appeal to this Court. States continue to impose unconstitutional taxes, but when a court ultimately invalidates these taxes, many states nevertheless refuse to provide the taxpayer with constitutionally sufficient relief. This situation is a source of significant frustration [8] to taxpayers, and this Court is unfortunately the only forum in which a solution is available. In fact, over the past year the issue of remedies has reached such significance in the state and local tax community that the topic has been a feature of at least three of the major state tax conferences.[9] Perhaps, if the states are forced to confront the true costs of providing a constitutionally adequate remedy, the legislatures will be more mindful in crafting their tax statutes to begin with and will be quicker to address a constitutional problem when it comes to light. If this Court clearly exhibits its intent to enforce the Constitution's remedy rules on the states, states like Alabama (unconstitutional franchise tax) and California (unconstitutional dividends received deduction) [10] may decide

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[8] The lack of adequate remedies has become a frequent topic of discussion at taxpayer gatherings. Some taxpayers, after years of ultimately successful litigation challenging a tax have taken to cynically waving a dollar bill in the air and commenting that they have not received even one dollar in refunds from the suit. This is a sad commentary on the current system.

[9] Paul J. Hartman (Vanderbilt University Law School) State & Local Tax Forum 2001, New York University State and Local Tax Institute 2001, Georgetown University Advanced SALT Institute 2002.

[10] California is another perfect illustration of the pervasiveness of this problem. California has known since at least this Court's decision in *Fulton Corp. v. Faulkner*, 516 U.S. 325, 346- 47 (1996), that its dividend received deduction was unconstitutional because it discriminated against interstate commerce. However, in those at least six years, California has done nothing, except to resist taxpayer's challenges to the DRD, to fix the offending provision. Continuing such an illegal tax is not just inconvenient to the taxpayers. It fails to provide good fiscal management

in the future not to keep their clearly unconstitutional taxes on their books for a lengthy and ultimately costly fight. Such a result will save the states, taxpayers, and ultimately this Court unnecessary and repetitive litigation. COST and its members hope that this Court will again add light to this important issue.

ARGUMENT

Under the Due Process Clause of the United States Constitution, the Alabama Supreme Court unconstitutionally deprived the Petitioners of their property by retroactively removing previously established procedures on which the Petitioners had relied to remedy an unconstitutional tax.

I. DUE PROCESS REMEDY RULES IN STATE TAX CASES

A remedy for a state tax declared unconstitutional must comply with the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[11] *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1992). Under the Due Process Clause, a remedy is constitutional only if it meets two tests: 1) the remedy must provide either a predeprivation remedy or "meaningful backward looking relief," *id.*; and 2) the remedy must be "clear and certain," *Atchison, T. & S.F.R. Co. v. O'Conner*, 223 U.S. 280, 285 (1912); *McKesson Corp.*, 496 U.S. at 39 n. 22.

In *McKesson*, the Florida Supreme Court found that a Florida tax unconstitutionally discriminated against interstate commerce but provided prospective only relief. The court

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to the general populace of the state. The bill for the unconstitutionally collected tax just keeps getting bigger and bigger.

[11] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. XIV, § 1.

premised its denial of meaningful backward looking relief on its determination that the state relied in good faith on a presumptively valid statute, and the taxpayer would receive a windfall if it received a refund of a tax likely passed on to its customers. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 524 So. 2d 1000, 1010 (1988). This Court framed the issue before it as "whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no." *McKesson*, 496 U.S. at 31. In reversing the Florida Supreme Court, the *McKesson* Court held that the state must provide "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *Id.* at 36-37 (emphasis added).

In *Reich v. Collins*, 513 U.S. 106 (1994) the taxpayer challenged the constitutionality of a state tax under a statutory refund provision. *Id.* The state tax code provided for both predeprivation challenges (protests) and post-deprivation challenges (refund suits). After the tax was ruled unconstitutional, the state tried to avoid paying the refund by arguing that since the taxpayer could have challenged the tax before paying the tax, the taxpayer had paid the tax voluntarily and no refund was due. *Id.* at 110. This Court soundly rejected that argument. *Id.* at 111.

In a follow-up to *Reich*, the taxpayer in *Newsweek* sought a refund of an unconstitutional tax imposed on certain publications. In reversing the state court, this Court once again noted that under *Reich v. Collins*, the state must not employ a "bait and switch" approach to the availability of remedies. *Newsweek*, 522 U.S. 442.

Thus, the rule is clear: a state has flexibility in the type of relief it provides, but once that relief is available and relied on by injured taxpayers, the state cannot retroactively withdraw it as a choice. This is true even if the state also provided

other procedural remedies in excess of those constitutionally required.

II. ALABAMA'S REMEDY DESIGN AND APPLICATION

Alabama, like many states, provided both administrative and judicial remedies to taxpayers seeking to recover a tax incorrectly collected by the State. In most cases, the administrative procedures must be completed before the taxpayer had a right to proceed to court. Taxpayers' Bill of Rights and Uniform Revenue Procedures Act, Ala. Code 1975, § 40-2A-1 *et seq*. However, as is also common in other states, because the State administrative body does not have authority to rule a tax unconstitutional or illegal, it was considered futile to exhaust the administrative procedures when the only issue raised by the taxpayer was the validity of the tax statute itself. *Graves v. McDonough*, 88 So. 2d 371, 373 (Ala. 1956). Thus, in those circumstances, Alabama courts have for 45 years allowed suits to be brought directly in the court for a refund of an unconstitutional or otherwise illegal tax without first exhausting the fruitless administrative procedures. *See* cases cited at pages 7- 9, *Petitioner's Brief*. The taxpayer's right to pursue a challenge to the legality of a tax statute directly in court is so well established that it was recently specifically upheld in two Alabama appellate court cases. *Monroe*, 749 So. 2d at 473; *Sizermore*, 611 So. 2d at 1067-68. Thus, there is little doubt that the procedure of challenging the legality of a state tax directly in Alabama courts has a long and solid history in the State.

This case, however, changed everything. This case is a class action brought by Petitioners on behalf of foreign corporations who paid franchise taxes to the State of Alabama under the tax scheme ruled unconstitutional in *South Central Bell Telephone*. The Petitioners' complaint sought, among other items, a refund of the previously collected taxes. The Petitioners initially requested an injunction placing the

franchise taxes collected by the State into escrow pending a final determination as to the constitutionality of the tax. Pet. App. 68a-69a. The Alabama Supreme Court denied the escrow because the Petitioners had "an adequate remedy at law."[12] Pet. App. 70a-72a. After this Court ruled the disputed tax unconstitutional, the Commissioner requested dismissal of the Petitioners' case on the theory that the Petitioners had failed to exhaust their administrative remedies and, thus, the Alabama courts lacked jurisdiction. Pet. App. 39a-40a. The Alabama Supreme Court ultimately dismissed the case, finding that because the Petitioners had not exhausted their administrative remedies, which according to the Alabama Supreme Court was the sole procedure for aggrieved taxpayers to obtain a refund, the State had not waived its sovereign immunity from suit in state court and the Alabama courts lacked jurisdiction over the case. Pet. App. 34a. The Alabama Supreme Court determined that exhaustion of the administrative remedies was required notwithstanding a 45-year history and recent state appellate court precedent upholding a direct court action when the only

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[12] This is another example of the frustrations encountered by the Petitioners in this case. While the constitutionality of Alabama's franchise tax was pending, Alabama continued to collect the tax. It threatened companies that failed to pay with a withdrawal of their privilege to do business in the State. Even though it became clear to the State at some point prior to this Court's decision in *South Central Bell* that the tax was likely invalid (as evidenced by the State's failure to support its constitutionality before this Court) the State still continued to collect the tax. When the Petitioners asked that this tax at issue be put into escrow, the State promised that the Petitioners were not at risk of losing any remedies to which they were entitled so no escrow was necessary. Now that it has come time for Alabama to pay the piper, the State has pulled out every trick in the book—sovereign immunity, latches, exhaustion of remedies, *Chevron* prospectively, equitable need, and several more in a last ditch effort to avoid paying an illegally collected tax. It is embarrassing that a state government would behave like a three year old caught with her hand in the cookie jar.

issue involved the constitutionality of a state statute. App. 29a-33a

Thus, Alabama applied a game enjoyed by small children at play and people teasing pets—dangle a treat in front of your target and snatch it away just as they reach for it. The Alabama Supreme Court's justifications do not support the retroactive withdrawal of a procedural remedy, and therefore the Alabama Supreme Court should be summarily reversed.

III. ALABAMA'S RETROACTIVE WITHDRAWAL OF A PROCEDURAL REMEDY FOR AN ILLEGALLY COLLECTED TAX VIOLATES THE DUE PROCESS CLAUSE.

Alabama, at the very least, had never discouraged the practice of bringing a state tax challenge directly in state court when exhausting the administrative remedies would be futile due to the administrative agency's inability to declare a statute invalid. What does this precedent mean? It means that the judiciary itself accepted the Petitioners' procedural remedy as a valid course in Alabama. *Amicus* understands, and in fact supports, a state's needed flexibility in designing the procedural remedies available to its taxpayers. However, what *amicus* cannot support is the complete withdrawal by the Alabama Supreme Court of an explicit, judicially accepted procedure, *retroactivly*. "Under *McKesson*, [the State] has the flexibility to maintain [a] . . . remedial scheme, so long as that scheme is 'clear and certain.'" *Reich v. Collins*, 513 U.S. at 110-11 (emphasis added). Alabama's insistence on enforcing its unconstitutional tax on the Petitioners, despite the Petitioners' use of a procedure accepted by 45 years of precedent and the Alabama appellate courts, does not amount to a "clear and certain" remedy as required by the Due Process Clause.

As the Petitioners point out, the remedy provided by Alabama Supreme Court violates one of the clear standards already articulated by this Court—a state may not "bait and

switch" in applying a remedy. *Reich v. Collins*, 513 U.S. 106. This is just what Alabama did here: it offered the judicial remedy of a direct to court suit, but when the Petitioners came to court to obtain the advertised remedy, the state basically said—you made a mistake; you trusted us.

This Court is asked once again to specifically direct a state, in this case Alabama, to comply with, and not flout, the Due Process Clause contained in the Fourteenth Amendment to the United States Constitution. Alabama, like several other states,[13] has found itself in the predicament of deciding how to remedy an unconstitutionally imposed tax. Instead of crafting a remedy to correct the discrimination found in its tax through refunds, credits, or some other substantive relief, the State denies the Petitioners a day in court by asserting that the Petitioners pursued the "wrong" procedure. We have seen this before—Florida tried to claim that taxpayers that filed a refund claim rather than protest a tax before payment followed the wrong procedure and thus were precluded from recovery—and this Court has rejected such an action. If this court does not do the same here, it will send a message that incentivizes other state courts, legislatures, and tax agencies to follow Alabama's lead.

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[13] Some states do understand their obligation under the Due Process Clause to remedy unconstitutionally imposed taxes. Recently, following the finding in *In the Matter of Panhandle Eastern Pipe Line Co. et al.*, Kan. Supreme Ct., No. 86,277 (2002), that a tax benefit was illegally withheld, the state of Kansas announced plans to refund $25 million to the affected taxpayers. One of Kansas' state representatives recognized a fact that Alabama (and Massachusetts and Illinois before it) seems to have failed to internalize. Senate Minority Leader Anthony Hensley (D-Topeka) commented that: "I'm not sure we have any other option at this point . . . . We lost the suit." Alabama, like Kansas, lost the suit and therefore has no other option—it needs to pay up in one form or fashion. Alabama should not be allowed to shirk its obligations while Kansas shoulders its. Obviously, the disparity in the results in these cases demonstrates a need for guidance, and the role of providing such guidance falls squarely on this Court.

CONCLUSION

For the reasons stated above, COST respectfully requests the Court to grant the Petition for Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MILLCRAFT-SMS SERVICES, L.L.C.
and ARIZONA CHEMICAL COMPANY,

Petitioners,

v.

CYNTHIA UNDERWOOD, in her official capacity as Commissioner of the State of Alabama Department of Revenue,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

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STATEMENT PURSUANT TO RULE 29.6

Petitioner Millcraft-SMS Services, L.L.C. is the successor in interest to Gladwin Corporation; its owners, Millcraft and SMS AG, are privately held corporations. Petitioner Arizona Chemical Company is wholly owned by International Paper Company, which is publicly traded.

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The Commissioner fails to explain how a reasonable taxpayer could have known that Alabama's administrative procedures were the exclusive means to obtain a refund of unconstitutional taxes when the Alabama Supreme Court had to distinguish 45 years of its own precedent and overrule two Alabama Court of Civil Appeals opinions to reach this result. The Commissioner's brief in opposition misses the point of the petition. The Alabama Supreme Court violated the Due Process Clause by holding out a clear and certain remedy for refunds of unconstitutional taxes and then taking it away after this Court decided *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999). Petitioners offer the following reply to the Commissioner's brief.

First, the "adequate and independent state law ground" doctrine has no application to this case. *See* Resp.'s Br. at 9–14. Contrary to the Commissioner's protestation otherwise (*id.* at 12), this case falls squarely within the novelty exception to the doctrine, recognized in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457–58 (1958). *Accord Ward v. Love County*, 253 U.S. 17, 22–23 (1920); *see generally* HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 580 & n.4 (4th ed. 1996) (explaining the novelty exception); E. CHEMERINSKY, FEDERAL JURISDICTION § 10.5.2, at 669–70, 674–76 (3d ed. 1999) (same); R. STERN, ET AL., SUPREME COURT PRACTICE § 3.26, at 210 (8th ed. 2002) (same). The Commissioner fails to appreciate that the Alabama Supreme Court's decision itself violated due process by changing the remedies available to Petitioners in the midst of this litigation. *See Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 444–45 (1998); *Reich v. Collins*, 513 U.S. 106, 108, 110–11 (1994); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678–82 (1930). The Commissioner cannot prevent this Court's review of such a bait and switch by contending the decision below rests on a state law ground that did not exist until the Alabama Supreme Court decided this case. As this Court held in *Reich*, "Novelty in procedural

requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." 513 U.S. at 113 (quoting *NAACP*, 357 U.S. at 457–58). Here, because "nothing in the prior state cases . . . suggest[ed]" that the TBOR's administrative procedures were "the *exclusive* remedy" for a refund of unconstitutional taxes, Petitioners cannot "fairly be deemed to have been apprised" of the remedy's exclusivity. *NAACP*, 357 U.S. at 457. This is especially true considering that the Alabama Supreme Court in the prior appeal induced Petitioners to rely on their legal remedy, only to pull that remedy out from under them in its ultimate decision. This gambit failed the State of Alabama in *NAACP*, and it fails here for the same reason. *Compare NAACP*, 357 U.S. at 458, *with* Pet. App. 34a n.3, 70a–72a.

On the merits of the petition, the question is whether the Alabama Supreme Court held out what a reasonable taxpayer would have seen as a clear and certain remedy in the form of a direct action for a refund of unconstitutional taxes and then declared, only after this Court decided *South Central Bell*, that no such remedy exists. *Reich*, 513 U.S. at 108. The question is not, as the Commissioner repeatedly suggests, whether taxpayers knew the TBOR provided an alternative means of obtaining a refund. *See* Resp.'s Br. at 8–9, 15–16, 26–27.[1] That point is beyond dispute. The statute itself states that the TBOR's procedures supplement those "otherwise provided by law." ALA. CODE § 40-2A-2(2). Yet, until this case, no reasonable taxpayer would have thought the administrative procedures were the only means to obtain a

1. The Commissioner at two points in her brief makes the astounding claim that "many" taxpayers have received franchise tax refunds. *See* Resp.'s Br. at 8–9, 15. The Commissioner cites no record evidence to substantiate this claim, nor could she. Nothing in the record shows that a single taxpayer has received an appropriate franchise tax refund, let alone many.

refund of unconstitutional taxes, given the numerous cases holding an administrative body such as the Department of Revenue does not have jurisdiction to decide constitutional questions. *See, e.g., Corbitt v. Mangum*, 523 So. 2d 348, 350 (Ala. 1988); *State ex rel. Norwood v. Goldsmith*, 50 So. 394, 395 (Ala. 1909) (holding the statutory refund procedure "refers merely to cases where there has been some clerical mistake or error in the assessment or collection of taxes, and was not intended to clothe the county commissioners or board of revenue with the judicial function of passing upon the validity of an act of the Legislature"). The Commissioner conspicuously fails to answer this point.

The Commissioner has altogether failed to show this Court any case, other than the decision below, holding that the administrative procedures were "the *exclusive* remedy for unlawful taxes." *Reich*, 513 U.S. at 111. She simply quotes the decision below and then repeatedly claims—without citation to any other case—that an "unbroken line of authority" from the Alabama Supreme Court required a taxpayer to follow the statutory procedures to obtain a refund. *See* Resp.'s Br. at 10 ("unbroken line of authority"; no cite); *id.* at 12 ("63 years of . . . precedent"; citing only the decision below); *id.* at 13 ("previous decisions of the Alabama Supreme Court"; no cite); *id.* at 15 ("precedents . . . are consistent and long-established"; no cite); *id.* at 16 (quoting only the decision below). On page 18 of the brief in opposition, the Commissioner eventually cites two cases from 1939 and 1945 (*Glass v. Prudential Ins. Co.*, 22 So. 2d 13 (Ala. 1945), and *J.R. Raible Co. v. State Tax Comm'n*, 194 So. 560 (Ala. 1939)) in an attempt to substantiate her claims. But two cases over five decades old do not make an "unbroken line." The Commissioner's argument overlooks the Alabama Supreme Court's intervening cases from 1956, 1979, and 1983, two of them involving class actions, holding that "the necessity for pursuing the statutory remedy does not exist where the assessment complained of is void and

illegal." *Graves v. McDonough*, 88 So. 2d 371, 373 (Ala. 1956) (quoting 84 C.J.S. *Taxation* § 513 at n.90 (1954)), *quoted in Thorn v. Jefferson County*, 375 So. 2d 780, 788 (Ala. 1979) (class action), and *Eagerton v. Williams*, 433 So. 2d 436, 448 (Ala. 1983) (class action). And although the Commissioner contends that the Alabama Supreme Court has never allowed such a direct action against the State as opposed to a county (Resp.'s Br. at 17, 20–21), she fails to mention the 1988 decision in *Sims v. White*, a case involving ad valorem taxes administered by the Alabama Department of Revenue. 522 So. 2d 239, 241–42 (Ala. 1988). In *Sims*, the Alabama Supreme Court disagreed with the Commissioner on this very point, relying on *Eagerton*, *Thorn*, and *Graves* to hold "the procedural requirements of the statute are not always a prerequisite to obtaining the substantive relief provided by the statute." *Id.* at 240–41.

If, as the Commissioner contends, prior Alabama precedents were so clear, then the Alabama Supreme Court would not have had to distinguish *Eagerton*, *Thorn*, and *Graves* and overrule two decisions of the Alabama Court of Civil Appeals to reach its result. *See* Pet. App. 29a–33a. Looking to the same body of Alabama Supreme Court precedent that Petitioners relied on to bring this suit, the Alabama Court of Civil Appeals had held that a direct class action against the Commissioner is a valid means of obtaining a refund of unconstitutional taxes, separate from the administrative procedures. *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470, 473 (Ala. Civ. App. 1999); *Sizemore v. Rinehart*, 611 So. 2d 1064, 1067–68 (Ala. Civ. App. 1992). The Court of Civil Appeals had also considered and rejected the Commissioner's argument that sovereign immunity barred such a class action. *Sizemore v. Owner-Operator Indep. Drivers Ass'n, Inc.*, 671 So. 2d 674, 677 (Ala. Civ. App. 1995). Although the Commissioner now characterizes *Valhalla Cemetery*, *Rinehart*, and *Owner-Operator* as "aberrant" and "obviously mistaken decisions" (Resp.'s Br. at 15, 17), they can only be so characterized "in retrospect." *NAACP*, 357 U.S. at 457. She fails to explain how any reasonable taxpayer

before this case could have concluded that the administrative procedures were "the *exclusive* remedy for unlawful taxes," *Reich*, 513 U.S. at 111, when not a single judge on the Alabama Court of Civil Appeals had so concluded.[2] The fact that the Alabama Supreme Court had to expressly overrule *Valhalla Cemetery* and *Rinehart* and implicitly overrule *Owner-Operator* is the best evidence that the decision below is an unconstitutional bait and switch prohibited by *Reich* and *Newsweek*.

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2. The cases the Commissioner cites for the proposition that *Valhalla Cemetery*, *Rinehart*, and *Owner-Operator* "are contrary to the vast weight of authority in the Court of Civil Appeals" (Resp.'s Br. at 18 n.2) do not support the proposition. All of those cases involve taxpayers who elected to pursue their administrative remedies under the TBOR; none involved taxpayers who elected to file a direct action. *See Tindle v. State Farm Gen. Ins. Co.*, __ So. 2d __, 2001 WL 564284, at *4 (Ala. Civ. App. May 25, 2001) (involving challenge to insurance rate that fell within primary jurisdiction of Department of Insurance; citing the TBOR merely as comparable statute), *reh'g denied* (July 27, 2001), *writ quashed by Ex parte Tindle*, __ So. 2d __, 2002 WL 92921 (Ala. Jan. 25, 2002); *State Dep't of Revenue v. Garner*, 812 So. 2d 380, 383–84 (Ala. Civ. App. 2001) (holding taxpayer filed inadequate supersedeas bond under the TBOR); *State Dep't of Revenue v. Taft Coal Sales & Assocs., Inc.*, 801 So. 2d 838, 839 (Ala. Civ. App. 2001) (noting merely that taxpayer complied with procedures of the TBOR); *State Dep't of Revenue v. Adams*, 798 So. 2d 682, 684 (Ala. Civ. App. 2001) (holding taxpayer filed untimely appeal in wrong forum under the TBOR); *State Dep't of Revenue v. Medical Care Equip., Inc.*, 737 So. 2d 471, 473 (Ala. Civ. App. 1999) (finding taxpayer failed to perfect claim by paying tax or posting supersedeas bond under the TBOR); *State v. Union Oil Co.*, 686 So. 2d 284, 286 (Ala. Civ. App. 1996) (noting merely that taxpayer complied with procedures of the TBOR); *State Dep't of Revenue v. Kennington*, 679 So. 2d 1059, 1059–60 (Ala. Civ. App. 1995) (same); *State Dep't of Revenue v. Zegarelli*, 676 So. 2d 354, 355 (Ala. Civ. App. 1996) (holding taxpayer filed untimely appeal without paying the tax or posting a supersedeas bond under the TBOR); *State Dep't of Revenue v. Wilcox*, 639 So. 2d 1374, 1374 (Ala. Civ. App. 1994) (holding taxpayer filed untimely appeal under the TBOR).

In addition, no prior precedent indicated that the act of providing a tax refund is ministerial "only because the statutes make it so." Pet. App. 29a (emphasis removed). The Commissioner does not cite any case, other than this case, for that proposition. *See* Resp.'s Br. at 19. This is understandable, given that the Alabama Supreme Court could not either. *See* Pet. App. 29a. It defies logic to maintain that the act of refunding unconstitutional taxes is ministerial if the taxpayer pursues statutory procedures, yet the same act is not ministerial if the taxpayer sues directly for a refund. Moreover, the Commissioner cannot explain how the TBOR could make that act ministerial when the Alabama Constitution prevents the Legislature from waiving the State's sovereign immunity. *See* Pet. 10–11. Petitioners agree with the Commissioner that this is "bizarre." Resp.'s Br. at 23. It also indicates the lengths to which the Alabama Supreme Court was willing to go to avoid this Court's decision in *South Central Bell*.

Finally, the Commissioner reveals the extent of Alabama's recalcitrance in this matter by arguing that *South Central Bell* did not hold Alabama's foreign franchise tax unconstitutional. *See* Resp.'s Br. at 20–21, 22.[3] Though this argument is

3. The Commissioner's muddled attempt to distinguish between a "void or illegal" tax and one that has been declared unconstitutional is unavailing for a number of reasons. *See* Resp.'s Br. at 20–21, 22–23. First and foremost, this Court declared that Alabama's foreign franchise was "facially" unconstitutional in *South Central Bell*, 526 U.S. at 169. If a facially unconstitutional tax is not void or illegal, it is hard to imagine what is. Furthermore, the Alabama Supreme Court itself has allowed taxpayers to bypass the administrative refund procedures where, as here, the tax was challenged as unconstitutional and thus "void and illegal." *Thorn*, 375 So. 2d at 788 (equal protection challenge). Finally, the Commissioner's reliance on that portion of *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 39 (1990), discussing a State's options for remedying a discriminatory tax has no bearing on whether a State can revoke a clearly established tax remedy in the course of litigation.

remarkable, it is not surprising. After this Court in *South Central Bell* held that "the franchise tax Alabama assesses on foreign corporations violates the Commerce Clause," 526 U.S. at 162, the Commissioner filed an answer in this case in which she "denie[d] that the foreign franchise tax was unconstitutional and further denie[d] that the U.S. Supreme Court has held that the foreign franchise tax was unconstitutional." Answer ¶ 5 (filed Nov. 17, 2000). She continued to defend the constitutionality of the tax in the trial court (*see* Pet. App. 42a) and now seeks to do the same in this Court. Apparently, the Commissioner will not relent until another decision by this Court holds that *South Central Bell* means what it says.

Although the Commissioner's 28-page brief in opposition strives to portray this case as one concerning the intricacies of Alabama's sovereign immunity law, it is much more significant than that. If this Court allows the Alabama Supreme Court's decision to stand, that decision will become the primer for how to evade this Court's constitutional tax rulings. Whenever this Court invokes the Constitution to protect taxpayers' rights, the States will invoke sovereign immunity to deny the remedy. *Reich* provides the means to break this impasse, for "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment, *the sovereign immunity States traditionally enjoy in their own courts notwithstanding*." 513 U.S. at 109–10 (internal citation omitted; emphasis added). If *Reich* is to have any practical effect, however, this Court must be willing to step in to assure that the remedy follows the right.

Because the Alabama Supreme Court improperly invoked sovereign immunity to take away the taxpayers' right to sue for a refund of unconstitutional taxes, Petitioners ask this Court to grant the petition and summarily reverse the decision below.

Respectfully submitted,

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